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REPORTS
OF
CASES
DETERMINED
IN
THE CONSTITUTIONAL COURT
OF

SOUTH-CAROLINA
PREVIED
LAW SCHOOL

LIBRARY.
BY D. J. MCCORD,

A MEMBER OF THE COLUMBIA LAM.

VOL. I.

Being a continuation of Nott & McCord's Reports.

COLUMBIA, S. C.

PRINTED AND PUBLISHED, BY

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1822.

DISTRICT OF SOUTH-CAROLINA.

BE IT REMEMBERED, that, on the ninth of October, *Annus Domini*, one thousand eight hundred and twenty two, and in the forty-seventh year of the Independence of the United States of America, **DAVID JAMES MCCORD**, Esq. deposited in this office, the title of a Book, the right whereof he claims as proprietor, in the words following, to wit:

“Reports of Cases, determined in the Constitutional Court of South-Carolina, by D. J. McCORD, a member of the Columbia Bar. Vol. I. being a continuation of *NORTT & MCCORD'S* Reports.”

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IT is expected that the indulgence of the profession will charge the errors, that may be found in this volume, to the ill health of the Reporter during most of the time of its preparation and printing. Indeed some parts of his labours were performed in bed. In a climate like ours, the confinement and attention necessary for the execution of any work of the kind, when added as an adjunct to other duties, is most sure to induce disease. Were one to report for the Court of Chancery as well as the Law Court, he would find it quite as much as would be compatible with his health. The time necessary to conduct the publication of reports, is so much taken from a lawyers profession, and will, as a matter of course, injure it. By the arrangements, under which at present the work is published, it is impossible that the reporter can be remunerated for his labours. These labours are certainly more arduous than those attached to any office in the state, as they are not to be performed by deputies. The present volume concludes with the last sitting of the Constitutional Court at Columbia—May 1822. The Charleston term of January 1822, has been unavoidably omitted. Applications were made to the Clerk of the Court in Charleston for copies of the opinions of the judges of that term, but they were never received until the day that the volume was completed. As we could not procure that term of Charleston, we inserted the next Columbia term. In most instances the names of the gentlemen who argued the Charleston cases have been omitted. We also made applications for them; but did not procure them until it was too late.

JUDGES
OF THE
CONSTITUTIONAL COURT
OF
SOUTH-CAROLINA,
DURING THE TIME OF THIS VOLUME,

HON. ELIHU H. BAY, (*Senior Associate.*)
HON. ABRAHAM NOTT.
HON. CHARLES J. COLCOCK.
HON. RICHARD GANTT.
HON. DAVID JOHNSON.
HON. JOHN S. RICHARDSON.
HON. DANIEL ELLIOTT HUGER.

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WARREN R. DAVIS, Esq. (*Western Circuit.*)
JOHN S. JETER, Esq. (a.) (*Southern Circuit.*)

(a.) Elected 7th. December, 1820.

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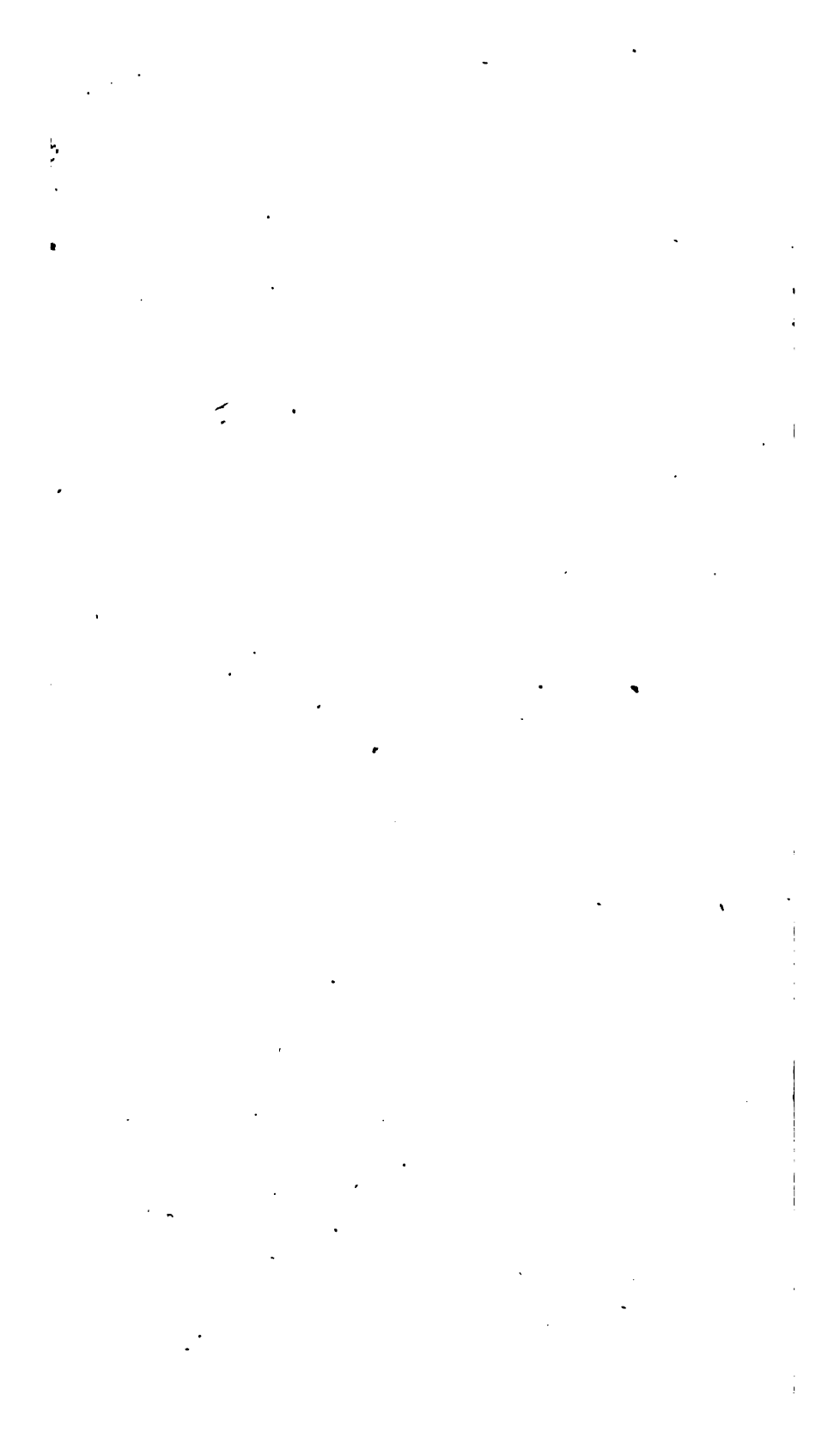
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CONSTITUTIONAL COURT

OF

South-Carolina, January Term, 1821.—Charleston.



JUSTICES PRESENT THIS TERM.

ELIHU HALL BAY, RICHARD GANTT,
ABRAHAM NOTT, DAVID JOHNSON,
CHARLES J. COLCOCK, JOHN S. RICHARDSON,
DANIEL E. HUGER.



HENRY BOWIE & SONS, vs. THOMAS NAPIER & Co.

A Factor can not pledge the goods of his principal for his own debt.—
But it is equally clear, that when a Consignee acts within the scope
of his authority, and employs a sub-agent to carry that authority into
execution, as by selling goods consigned to him, or doing any other
act within that authority, that such sub-agent has a lien on the goods
upon which he has made advances for the purposes of a sale.

THIS case was tried in the City Court, before the Recorder, and was brought up on appeal from his decision. The facts as stated in his report, are as follows :

The plaintiffs, residents of Paisley, in Scotland, consigned some packages of goods to Mr. *Walter McCoul*, in Charleston, for the purpose of sale ; Mr. *McCoul* being a merchant who both imported on his own account, and sold goods on account of others. In March, 1818, *McCoul* deposited with the defendants, who were vendue-masters, certain merchandise, belonging to himself, also, the merchandise consigned to him by the plaintiffs, with directions to sell as opportunities offered. The defendants, upon

the receipt of these goods, became securities for the duties upon them, which they have since paid, and made to Mr. *McCoul* large advances upon them, generally. For when they were delivered, no distinction was made between those parts which were the property of the plaintiffs, and those that were the property of the consignee. The defendants believed the whole to have been the property of *McCoul*. In which belief, they were confirmed by the delivery of the bill of lading, of which the following is a copy. "Paisley, 12th December, 1817, consigned Mr. *Walter McCoul*, per the *Betsy*, Thomas Taylor, from London for Charleston, under full insurance by, *Henry Bowie & Sons*. (Maked) W. M.:" Then followed a description of the packages.

On the 18th of February, 1819, the plaintiffs, by their agent in Charleston, demanded from the defendants the proceeds of such of the goods specified in the above bill of lading, as had been sold, and the restoration of such of them as had not been sold. This was the first intimation given to the defendants, that the plaintiffs claimed the goods. This notice was given after the sale of that part of the merchandise, for the recovery of the proceeds of which, the first action was brought.

The defendants refusing to comply with the demand of the plaintiffs, these suits were instituted to recover the money arising from the goods which had been sold, and the return of those which remained unsold with the defendants.

It was admitted that the plaintiffs were, in fact, the owners of the goods mentioned in the foregoing bill of lading; but the defendants were ignorant of it, until the time of the demand made upon them. Such of the goods of the plaintiffs as were unsold at the date of the receipt of the notice, were afterwards disposed of by the defendants; and upon debiting the consignee with the amount of duties paid, and of advances made, and crediting him with the total proceeds of the sales, a balance would still be due by the consignee, which had never been paid. It was proved that it was the custom for merchants in this state to obtain

advances on goods consigned to them by foreign merchants for sale, by depositing them with an auctioneer, who, when he sold, reimbursed himself for his advances.

The counsel for the plaintiffs contended that they were entitled to recover,

1st. Because the consignee having only authority to sell, could not pledge; and that the fact of the ownership being unknown to the defendants made no difference.

2d. Because the law being fixed, no custom could be set up against it; and if such a custom could be pleaded, it could not be maintained; as it was unreasonable and unjust.

3d. That admitting such custom to be reasonable and just, to be available, it must be shewn to have existed previously to the Act of the Legislature of 1712, (1 *Brev. Dig.* 136. *Grimke, P. L.* 99,) making the English common law of force in this state. The counsel further contended that the defendants had no lien even for the duties paid to the custom-house; as the plaintiffs had made their demand within a year, before the expiration of which period, upon a re-exportation of the goods, they would have been entitled to the drawback. In support of his first position, the counsel quoted 1 *Com. Con.* 236-7. 1 *Livermore*, 129, 141. 1st *Maule & Sel.* 140. *Ib.* 484. 2 *Maule & Sel.* 298. 2 *Mass. T. R.* 398. *Van Amringe vs. Peabody*, 1 *Mason R.* 440. *Newsom vs. Thornton, et. al.* 6 *East's R.* 17, 25. *McCombie vs. Davies, Ib.* 538. 7 *East's R.* 5. *S. C.* In support of the second position, 2 *Johnson's Rep.* 335.

The counsel for the defendants admitted the law of England to be, that a factor directed to sell, could not pledge the goods of his principal; but said,

1st. That the law, even in England, was not without exceptions.

2d. That there was a difference in this case, as the goods were placed with the defendants for sale, which authorized them to retain; and

3d. That commercial usage is the law of the country in

which it prevails, and is founded upon the *jus gentium*, not the municipal law of any nation. That by the Act of Assembly of 1712, the customs and usages of this state are unaffected by the common-law of England; and that a lien in this case had been fully proved to exist, by custom. He also contended, that in any event, the money received by the defendants, before the notice of the plaintiffs claim, could not be recovered by them, as it had been regularly passed in account with the consignee. To sustain his first position, the counsel relied upon *Collins vs. Martin*, 1 Bos. & Pul. 648. 7 Term Rep. 355. *Pultney vs. Keymer*, 3 Esp. R. 182. *Ib.* 268. 2 Bell Com. 76, 79, 80, 319. *Pardessu*, 426. For his second position, he relied upon the facts as proved, and the cases of *George vs. Claggett*, 7 Term. Rep. 355, and notes. *Pultney vs. Keymer*, 3 Esp. R. 182. *Ib.* 268. In support of his third position, the counsel quoted 1st *Marshall's Ins.* 19, and the Act of the Legislature, passed in 1712.

The Recorder conceived that the plaintiffs ought not to recover, and a verdict was found for the defendants.

A motion was now made for a new trial, on the following grounds:

1st. Because by a settled rule of the commercial law, adopted in this state, a factor or consignee cannot pledge the goods of his principal for his own debt.

2d. Because no evidence of mercantile usage in this state can be received to contradict a settled rule of the commercial law.

3d. Because the charge of his honor the Recorder, it was respectfully contended, was contrary to law in the foregoing particulars.

Mr. Justice *Colcock* delivered the opinion of the Court.

As to the first ground, the Court are unanimously of opinion that a factor cannot pledge the goods of his principal for his own debt; and although it should be considered as a hard rule, and sometimes producing the most injurious effects on persons acting under the purest motives,

yet, the long train of decisions put it out of the power of the court to question the doctrine. As the Judges of England say, it is vain for us now to speculate on the subject.

The authorities referred to by the counsel, are recognised as law by the Court. But it is equally clear from the cases, that when a consignee acts within the scope of his authority, and employs a sub-agent to carry that authority into execution, as by selling goods consigned to him, or doing any other act within that authority, that such sub-agent has a lien on the goods, on which, he has made advances for the purposes of a sale. (7 Term. R. 355. *George vs. Claggett*, 3 *Espinasse*, 182, 268. 4 *Camp*. 60, 349.)

In the case of *Martini vs. Coles and others*, (1 *Mauic & Selwyn*, p. 147,) Lord Ellenborough says, "the defendants therefore received the goods in order to sell them, which makes the only distinction between this and the former case, viz : That here the possession of the defendants was legal in the first instance. The defendants then being authorized to sell the goods, if they had advanced money for any purposes connected with the sale, and for which brokers, in the ordinary course of disposing of goods, are accustomed to advance, they would have had a lien in respect of such advances ; but no claim of that sort is advanced."

The question then is, whether this was a pledge for a pre-existing debt, or one contracted at the time of the consignment ; or whether the money was not advanced in the usual mode of business, and for the purposes of effecting a sale? In the first place, I think there is such a marked difference between a pledge and a deposit for sale, that it would seem astonishing they should ever be confounded. By a pledge, we understand not only a thing that may be redeemed, but generally one that is intended to be redeemed. Now, when goods are deposited with orders to sell, such an idea as that of redemption can never enter the mind ; for the agent with whom they are deposited, may, in the shortest space of time, alienate the right ; and if he

be engaged in much business, and the articles saleable, often times does so. But it is said the authority to retain in England for advances made, is confined only to brokers, whose business is generally understood to be to effect sales, and who are legally authorized agents. If the principle be admitted because such agents in England are necessary, and are in consequence of their duties often times obliged to advance money, I would ask, why not under the same necessity, the same consequence with us? We are a commercial people to a certain extent. A consignee may require the aid of a sub-agent here as well as in England, and why not that sub-agent be allowed here to retain for his advances made in the way of his business as well as in England. He performs the same duties, although perhaps not in the same manner; he stands in the same relation to his principal in other respects, why not in the most important one? The answer is,—because he is called vendue-master, and not broker. In this country, nothing is more common than for the same man to act in different characters: and rather than sacrifice principle to a name, we will call him a broker. He is licensed by the public, and enters into bond and security. His business is as well known here as that of any broker in England, and it is the same.

As it appears to the Court that the defendants came legally into the possession of the goods without any knowledge of any other claimant than the consignee;—that they were deposited *bona fide* for sale, that they advanced, as was usual, money on these goods, by paying the duties and a price to the consignee, *McCoul*, they are of opinion that the motion should be discharged.

Justices *Gantt*, *Huger*, and *Johnson*, concurred.

—— for the motion.

King, contra

LOVEL & PAINE vs. I. B. WHITRIDGE.

Debts to be set-off must be in mutual rights ; and an individual demand can not be pleaded in discount of a demand due to a partnership, unless it can be shewn that an agreement or understanding existed between the parties, that such a private demand should be received in discount.

TRIED before the City Court of Charleston, September Term, 1820.

The question in this case was, whether an account due by *Paine*, one of the partners, to the defendant, could be set-off against the debt, due by the defendant to the plaintiffs ?

The book-keeper of the plaintiffs proved that the entries were made in the usual manner ; that according to them, the defendant appeared to be the debtor of the firm. Some of the articles were furnished under written orders, drawn by the defendant upon *Paine*, and some without such orders ; that whether the goods were sent with or without orders, the entries were the same ; and that it was notorious that the plaintiffs were partners at the time when these goods were purchased. Their names were over the door of the store ; and the defendant himself was frequently in the house, and upon entering it, could not avoid seeing the names over the door.

Both of the plaintiffs were then examined.

Mr. *Paine* said, that in 1816 or 1817, he made an agreement with the defendant, under which, the defendant was to get from him such articles as he wanted : that the witness mentioned it to his partner *Lovel*, who said nothing in reply. Under this agreement the defendant was to take out of the store a sufficiency of articles to satisfy a private debt due by the witness to the defendant : that in the books of *Lovel & Paine*, the things taken by the defendant were not carried to the individual account of the witness. *Lovel*, he said, was present when some of the articles were delivered to the defendant under orders drawn by him

upon the witness. *Lovel* never said that the defendant should be discharged from his liability to the firm. The defendant was debited in the books like any other person purchasing from the partnership. The articles purchased by the defendant were the property of *Lovel & Paine*.—The defendant knew of the partnership, and that the goods came out of their store. He said that the partnership was dissolved, and the collection of the debts due to it was exclusively with *Lovel*.

Mr. *Lovel* said, that he knew that the defendant was a creditor of *Paine*: that for the articles purchased by the defendant, he considered him exclusively responsible; and that *Paine* never said he would be answerable for the defendant's payment. If *Paine* had been considered answerable, he would have been charged as being so in the books, which had not been done. Things had been delivered out of the store frequently, under orders drawn upon *Paine* alone, and under orders drawn upon the witness alone; and if he had regarded himself as individually responsible under any orders drawn upon himself, he should have charged himself in the books, and so ought Mr. *Paine* to have acted, if he thought himself bound for the payment of defendant's debt. The witness did not permit the defendant to take the articles upon the credit of *Paine*, but upon his own credit, as he regarded the defendant to be perfectly solvent, and would have trusted him to a much larger amount: that if his opinion of the defendant had been different, the witness would not have sent him the goods. The witness had, in other instances, refused to send goods under orders drawn upon *Paine*. He recollected particularly the case of *Orran Byrd*, and the reason for that refusal was, that he did not think *Byrd* could be trusted with safety. The partnership between *Paine* and the witness was dissolved, and *Paine* was indebted to the firm upwards of \$5,000.

His Honor observed to the jury, that under the discount law, debts to be set off must be in mutual rights; that an individual demand could not be pleaded in discount against

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a demand due to a partnership, unless it could be shewn that an agreement or understanding existed between the parties, that such a private demand should be received in discount; and that as such proof had not been exhibited in this case, he thought the plaintiffs entitled to a verdict.

The jury found a verdict for the plaintiffs, rejecting the discount.

The particulars of the discount were not gone into; it being agreed by the counsel on both sides to submit to the Court the question of law arising under it: A notice that a new trial would be moved for was served upon the Court. The grounds are included.

Mr. Justice *Colcock* delivered the opinion of the Court.

In this case, the Court concur with the Recorder in the view which he has taken of the law, and are also of opinion that there was no evidence to take the case out of the operation of the principles laid down by him. There was no agreement on the part of *Lovel*, that the debt of *Paine* should be paid out of the co-partnership funds. Nor indeed was any such evidence as ought to be relied on, offered to shew that *Paine* himself intended it; for if so, he certainly ought to have debited himself with the goods delivered the defendant. As to the orders being drawn on one of the co-partners, it cannot benefit the defendant, for this is very common; and it is clear he knew he was receiving the goods of the co-partnership. It may be his misfortune to have misplaced his confidence, but the Court can not depart from the established rules of law to afford him relief. The motion is discharged.

Justices *Johnson* and *Huger*, concurred.

Mr. Justice *Gantt*, dissented.

ELISHA WALLING vs. WM. JENNINGS.

A defendant imprisoned under an execution in a case of slander, is entitled to the benefit of the insolvent debtors act.

THE defendant had been arrested on an execution, and applied for the benefit of the insolvent debtors act. This was opposed by the plaintiff, on the ground that as the defendant was imprisoned in a case of slander, he was included in the exceptions contained in the eighth clause of the act, which is as follows :

“ Provided, that no person or persons shall be entitled
“ to the benefit of this act, who shall be sued, impleaded,
“ or arrested for damages recovered in any action for wilful
“ maihem, or wilful and malicious trespass, (a) or for dam-
“ ages recovered in any action for voluntary and permissive
“ waste, or for damages done to the freehold.” (2 Brev.
Dig. 153. Grimke, P. L. 251.) The plaintiffs counsel con-
tended that the action of slander was an action of trespass;
that when a plaintiff recovered, it was of course proved to
be wilful and malicious; and consequently this was a case
comprehended within the very words of the act. He ur-
ged that the injury done to character by the slanderer was
often times greater than that of maihem, or injuries to the
freehold, and that it should therefore be inferred that the
Legislature might as well mean to curb the tongue of the
licentious slanderer by perpetual imprisonment as to re-
strain those acts of violence done to the person or prop-
erty of a citizen, which are clearly designated in the clause.

The presiding Judge was of opinion, that he was entitled to the benefit of the act, and he was discharged. A motion was now made to reverse the decision, as being contrary to law; and also that the plaintiff should be permitted to retake the defendant under the said execution.

Mr. Justice Colcock delivered the opinion of the Court.

One of the best established rules in the construction of statutes is, that where the Legislature use technical lan-

guage, that the technical meaning shall be applied. Now I take it, that the word trespass is technical, and so considered, will lead us to the obvious meaning of the Legislature. In all the elementary writers, and those who treat of the forms of actions, there is a clear and manifest distinction between trespass and case. In treating of personal actions, the first grand division made by Mr. *Chitty* is into those which arise *ex contractu*, and those which arise *ex delicto*. In speaking of the latter, he says, personal actions in form *ex delicto*, and which are principally for the redress of wrongs unconnected with contract are, Case, Trover, Detinue, Replevin, and Trespass *vi et armis*: and (in the same page,) injuries, *ex delicto*, are in legal consideration committed with force; as assaults and batteries, &c. or without force, as slander, &c. They are also immediate and direct, or mediate and consequential.

It is frequently difficult to determine when the injury is to be considered forcible or not, and when immediate or consequential, and therefore whether trespass or case is the proper remedy (1 *Chit. P.* 122-3, *Day's ed.*) Here he makes a clear distinction between the actions of Trespass and Case; and in treating on the action of slander, he places it under the head of actions on the case. But further, Trespass, says *Finch*, supposes a wrong to be done with force. Trespasses against a man's property may be committed in divers ways; as against his wife, children, &c. and against his land, by carrying away deeds, cutting trees, spoiling grass, &c. *Finch*, 198, 201. *Roll. Abridg.* 542, in a statute where even the word Trespass is used, unconnected with any other words, it implies an injury to the person or estate. But if this technical distinction is not sufficiently clear to shew that the Legislature meant to exclude from the benefit of the act only such as did commit acts of violence on the person or property wilfully and maliciously, it is obvious from the other class of cases embraced in the clause. The first is *malharm*, a word purely technical, and which means any injury to the

person which would render one less able to protect or defend himself. This is the highest offence known in law against the person. The third is voluntary and permissive waste, an injury to the property; and the fourth, damages to the freehold, generally, which of course is of the same character. This association points to the meaning of the Legislature, and plainly shews that they meant to exclude from the humane provisions of this act only those who, instigated by malice, wilfully committed such acts against the person and property of the citizens, as would be most highly injurious and lasting in their effects. But what in my mind is conclusive on the subject is this, that if the construction contended for by the plaintiffs should prevail, that the object of the law would be almost entirely defeated. For if slander can be embraced under the terms, so may all torts; and should this be denied, I ask for the distinction? None I think can be pointed out, for they are in one sense actions of trespass. This is a remedial law, and in favor of liberty. Its general provisions should therefore be liberally construed, and its exceptions confined within the narrowest bounds.

The motion is discharged.

Justices *Nott*, *Johnson* and *Huger*, concurred.

Mr. Justice *Gantt*, dissented.

(a.) By the terms "*wilful and malicious trespass*," the Legislature seem clearly to have meant what is called, "*malicious mischief*" in the Sta. 22 and 23, Car. 2, ch. 7, (Grimke, P. L. 80. 2 Brevard Dig. 36, art. 9. R.



J. VAN HOLTEN vs. LEWIS & PEPOON.

The Court, at its discretion, may grant a motion to plead double at any time, so as not to operate a surprise on the plaintiff; and the plea of *non-demiset*, and "*no rent in arrear*," may be pleaded together.

TRIED before Mr. Justice *Richardson*.

The brief stated in this case, that this was an action of

replevin, and that the defendant had avowed for rent in arrear. The plaintiff pleaded "no rent in arrear," and issue was joined thereon. At the moment when the defendant offered to go to trial, the plaintiffs counsel moved for leave to substitute the plea of "no demise" in place of his former plea, or for leave to plead "no demise" in addition to his former plea, which was granted.

A motion was now made to set aside the order in this case, on the grounds,

1st. That the Court erred in granting the motion in the alternative.

2nd. That the Court erred in granting a motion to substitute a good plea for a bad one, and thereby changing the issue.

3d. That the plea of "no rent in arrear," and "no demise," are inconsistent.

Mr. Justice *Colcock* delivered the opinion of the Court.

The counsel seemed to rely most strongly on the situation of the parties, that this was the third Court, and the defendant ready for trial. Upon looking into the minutes of the Court, it appears that this motion was granted on the last day of the Court, on which no issues are tried. There was therefore no improper exercise of that discretion with which the Court is unquestionably vested. This was in effect no more than a motion to plead double, which may be granted at any time so as not to operate as a surprise on the plaintiff. And here it was granted on the last day of one sitting, and the plaintiff of course would have time enough to reply and procure testimony, if any were necessary, before the sitting of the next Court. As to the inconsistency of the pleas, it is not greater than many which are daily admitted. For instance, in debt on bond, *non est factum*, and payment; and these are very common.

The motion is dismissed.

Justices *Nott*, *Gantt*, *Johnson* and *Huger*, concurred.

HARDY PENTERS vs. JAMES ENGLAND and JANE ENGLAND, his Wife.

In an action of slander, for words spoken by the husband, words spoken by the wife can not be joined; and it is a subject for arrest of judgment if the wife be joined for words spoken by the husband alone.

TRIED before Mr. Justice *Colcock*.

This was an action of slander. The declaration charged in the three first counts, certain slanderous words spoken by the wife of the defendant against the plaintiff, and in other counts, certain slanderous words spoken against the plaintiff by the other defendant, *James*, the husband. A verdict was found for the plaintiff, and a motion in arrest of judgment, was now made on the following grounds:

1st. That a plaintiff can not join a wife in an action for words spoken by the husband only.

2d. That a plaintiff can not join in one action a slander spoken by the husband. and a slander spoken by the wife.

Mr. Justice *Colcock* delivered the opinion of the Court.

The law upon this subject is too clear to admit of doubt. If a wife be joined in an action for words spoken by a husband only, it will be error. Hence, if slander be spoken by the husband and wife, there must be separate actions. One against the husband for the slander spoken by him; and another against the husband and wife, for the slander spoken by the wife; and the Court will never order such actions to be consolidated. (1 *Selwyn*, *Nisi Prius* 315. 2 *Wilson*, 227: 1 *Bacon*, 504, *Title Baron & Feme*. 1 *Dyer Reports*, p. 19, in a note.

The motion is granted, and a judgment arrested.

Justices *Nott*, *Johnson*, *Huger* and *Gantt*, concurred.

FRANCIS LABORDE vs. C. RUMPH.

In an action of detinue, the damages were laid in the declaration to be only one hundred dollars, and the verdict was for the article detained or its value \$ 100, and \$ 100 damages; held that it was not a cause for arrest of judgment, on the ground that the verdict exceeded the amount of damages laid in the declaration.

THIS was an action of detinue to recover a horse. The property was proved the plaintiff's; and a demand of him on the defendant was made. It also appeared that the plaintiff had been long deprived of his use. The verdict was for the plaintiff for the horse, or if he could not be had, for \$ 100, which was fixed as his value, and also for \$ 100 damages.

A motion in arrest of judgment was now made on the ground, that the verdict exceeded the amount of damages laid in the declaration.

Mr. Justice *Calcock* delivered the opinion of the Court.

Upon an inspection of the record, it appears that the action is properly brought, and that the declaration charges the detention of the horse, whose value is stated at \$ 100, and it concludes to the damage of the plaintiff, one hundred dollars. The verdict is in strict conformity with the pleadings and the law. It finds the property to be in the plaintiff, and adds, as all verdicts in detinue do, a finding for the value of the horse if he can not be had. It then proceeds to the damages, and estimates them at \$ 100.—The judgment is entered up for the horse, and damages and costs. The action being for the specific article, that, or the value of it, is not considered as forming any part of the damages. The verdict then is not as was supposed for a greater amount of damages than laid.

The counsel for the defendant also stated in his brief, as a ground for a new trial, that there was no evidence of the amount of damage sustained by the plaintiff. But as it was merely brought to the view of the Court, and was not

much relied on, it is unnecessary to go into a detail of the evidence. It is sufficient to say that the testimony was of such a character as would, in my opinion, have authorized the jury in estimating the damages at two hundred dollars, had the pleadings permitted them to go to the extent.

The motion is dismissed.

Justices *Nott*, *Gantt*, *Johnson* and *Huger*, concurred.



JACOB MARTIN vs. WILLIAM WALTON & Co.

It is not necessary that a special notice of dissolution should be given to persons who are accustomed to deal with a firm. And it is a question for the jury to decide whether there was such evidence of the dissolution of the co-partnership as to induce them to believe that the party knew it.

Notice published in a Gazette is conclusive on those who have had no dealing with the co-partnership; but as to such as have had dealings it shall not be so considered, unless under circumstances it appear satisfactorily to the jury that it operated as a notice.

An authority to one of a co-partnership to settle the affairs, receive and pay the debts, does not warrant him to draw a bill, or give a note in the co-partnership's name.

THIS was an action tried before Mr. Justice *Colcock*, on an indorsed note by the holder against the maker. The note was in these words: “\$3,000, Charleston, 15th May, 1815. Sixty days after date, we promise to pay to the order of *John P. McNeile*, three thousand dollars, value received. Endorsed *John P. McNeile*.

(“Signed,) *Wm. Walton & Co.* per *John Walton*.”

It appeared in evidence that *John* and *William Walton* had been co-partners, and that the co-partnership had been dissolved. To prove which, a printed advertisement in a paper of the city, under date of the 13th April, 1813, was produced, in which there was a notice of the dissolution of the co-partnership, and a reference to *John Walton*, as the person authorized to settle the concerns of the co-partnership.

Mr. *Beard*, who was an officer of the South-Carolina Bank, proved that there had been dealings between the plaintiff and *William & John Walton*, and *William & John Walton* and *McNeile*, and that the plaintiff had demands against both, *John & William Walton*, and against Mr. *John Walton* and *McNeile*. He also stated that the plaintiff had been an officer in the same bank with him in 1810 and 1813, and he was almost certain that this was a co-partnership debt—that is, that this note was given (as a renewal,) for a debt which had been due to the plaintiff by *William Walton & Co.* The plaintiff and *John & William Walton* were residents of the city.

The defendant's counsel contended that the note was drawn after the dissolution of the co-partnership, and without authority, and therefore could not bind the partnership.

The plaintiff's counsel contended, that as it was proved that there were dealings between the partnership and the plaintiff, previous to the date of the alleged dissolution, it ought to have been proved that there was a special notice given to the plaintiff of the dissolution. That the general notice could only affect those who had not had dealings with the co-partnership, and that the form of signature was no evidence of the dissolution of the co-partnership, as had been contended for by defendant's counsel.

The Judge charged the jury that it was for them to decide, whether there was such evidence of the dissolution of the co-partnership as to induce them to believe that plaintiff knew it; that he inclined to think there was.

The jury found a verdict for defendant.

A motion was now made for a new trial, on the ground that the verdict was contrary to law and evidence, inasmuch as it was not proved, as the law requires, that special notice to the plaintiff was given by the defendants of the dissolution of the co-partnership; the plaintiff having had previous dealings with the concern.

2d. The form of the signature to the note did not authorize the jury to infer that the plaintiff knew it was not a partnership note.

3d. There were no other circumstances from which the jury could infer that the plaintiff had notice of the dissolution of the partnership.

Mr. Justice *Colcock* delivered the opinion of the Court.

There is no doubt that if the note in this case was given after the dissolution of the co-partnership, and the plaintiff had notice of it, that the firm are not bound. An authority to one of a co-partnership to settle the affairs, receive and pay the debts, does not warrant him to draw a bill, or give a note in the co-partnership's name. (*Chitty on Bills, Story's edit.* p. 35.) The only question then is, whether the notice in this case was sufficient. The rule contended for by the plaintiff's counsel, of a special notice to each person who has had dealings with the copartnership, is too broadly laid down: it cannot be supported either by reason or authority. If the dealings had been extensive, it is not saying too much, to say that it would be impossible. All that is meant in laying down a rule is this, that the public notice in the Gazette shall be conclusive on those who have had no dealings with the co-partnership. But as to such as have had dealings, it shall not be so considered, unless, under circumstances, it appear satisfactorily to the jury, that it operates as a notice to the party. The rule can not mean any thing so absurd, as that one who has had dealings with a co-partnership, may not read their advertisement in a newspaper, as well as one who never had such dealings. Reason would seem to say in such a case, that after the long established practice of advertising the dissolution of co-partnerships, those who would be most affected by such dissolutions, would be most apt to look to the usual source of information on the subject. But on the present occasion, when we look to the situation of the parties, the length of time from the advertisement to the date of the note, the nature of the transaction as proved by the plaintiff himself, the form of the signature, combined with the notice in the Gazette, there is no room to doubt but that the plaintiff

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knew of the dissolution of the co-partnership. The parties both lived in the city of Charleston. The advertisement announcing the dissolution of the co-partnership was dated 3d April, 1813, and the note the 15th May, 1815.—Upwards of two years had been afforded to the plaintiff to acquire this knowledge. When we look to the nature of the transaction, it is conclusive. The defendants were indebted to plaintiff for large advances of cash. It was in the nature of a bank transaction; the notes to be renewed every sixty days, and the note is signed per *John Walton*. Can it be believed that the plaintiff would be ignorant of so important a fact in relation to persons so largely indebted, and that too for the loan of money? Is not the mode of signature unusual? It certainly is; for there are but two ways of signing a copartnership's name, one by writing the name itself, and another by signing the name of the co-partner who makes the note, and saying, for himself and the firm. And Mr. *Chitty* says, one of these should be pursued, as otherwise it might be doubtful whether it would bind the partner. (*Chitty on Bills*, p. 36.)

But there can be no doubt that the circumstances mentioned, together with the advertisement, were proper evidence to be submitted to the jury to prove the fact of the dissolution of the co-partnership, and the knowledge of it by the plaintiff; and as they have deemed them satisfactory, the Court will not disturb the verdict.

The motion is dismissed.

Justices *Nott*, *Johnson*, *Huger* and *Gantt*, concurred.



LEWIS LEAU vs. DANIEL O'HARA.

A, sold B. a negro slave, and gave a bill of sale in these words, viz:—"I have bargained, sold, and delivered, and by these presents do bargain, sell and deliver, a certain negro fellow, now in Georgetown gaol, to have and to hold, &c." Held, that in assumpsit, the vendor might prove that the bill of sale was dated the 8th, yet it was not delivered until the 15th, and that the negro escaped from gaol on the 14th, a day

before the delivery of the bill of sale, but that the purchaser bought and took upon himself the risk of getting possession of the slave.

THIS was an action of assumpsit, to recover back \$150, paid the defendant on account of the purchase of a negro man slave, called *Charles*..

The declaration, in addition to the usual money counts, contains two special counts, in which the plaintiff charges, substantially, though with a different modification, that he purchased the negro *Charles*, for, and at the price of \$350, and that the defendant, in consideration thereof, undertook and promised to deliver the said negro to the plaintiff. The breach assigned is, that he did not deliver him.

On the trial of the case below, the plaintiff gave in evidence a bill of sale, made by the defendant, and under his seal, to himself for the negro *Charles*, dated the 8th June, 1807, in which, after acknowledging the receipt of the consideration, in the usual form, proceeds in the following manner: "I have bargained, sold, and by these presents do bargain, sell and deliver to the said *Lewis Leau*, a certain negro fellow, called *Charles*, now in Georgetown gaol, to have and to hold, &c." and concludes with a general warranty of property in the negro. From the parol evidence adduced on the trial, it appeared that this bill of sale, although dated on the 8th, was not delivered until the 15th of June; and that the negro escaped from gaol on the 14th, one day before the delivery of the bill of sale; and that he had not since been retaken, and was lost to the plaintiff.

It also appeared that it was known to the plaintiff that *Charles* was a run-away, and on that account, the defendant consented to take for him much less than his appearance and qualities ought to have commanded; and the defendant propounded the question to the witness, whether the plaintiff did not agree, at the time of the contract, to take upon himself the risk of his being in Georgetown gaol, and of his escaping from it before he received him? To this question the plaintiff objected, on the ground that

it tended to contradict the bill of sale, and was therefore inadmissible. The presiding Judge being of that opinion, rejected the evidence.

The jury found for the plaintiff the amount claimed; being all that had actually been paid. And a motion was made for a new trial, on the ground, amongst others, that the witness ought to have been permitted to answer the question propounded on the part of the defendant.

Mr. Justice *Johnson* delivered the opinion of the Court.

There can be no doubt about the correctness of the principle, on which, the plaintiff resisted the admissibility of the evidence offered on the part of the defendant. All the authorities support the position, that parol evidence is not admissible to contradict a deed; and this court has so ruled in numberless instances. But it certainly is not applicable to the present case. The declaration, it will be recollected, is in assumpsit, and not covenant on the bill of sale; and the breach assigned is, that the defendant did not deliver the negro according to the terms of the contract set forth. Now the bill of sale contains no covenant for the delivery, but on the contrary, supposes a previous or at least, a contemporaneous delivery. "I have bargained, sold, and delivered, and by these presents do bargain, sell, and deliver, &c." are the terms of the deed. The proof of the plaintiff's case, therefore, did not arise out of the deed, but must be adduced *aliunde*; and I confess I am unable to discover, from the report of the case, any evidence going to establish the contract set out by the plaintiff. If it arises out of the deed, as has been insisted, the answer is, that he ought to have brought covenant on the bill of sale, for he cannot maintain assumpsit when he may have an action of covenant. (1 *Const. Rep.* 265, 329. 1 *Johnson's Rep.* 413, 503. 2 *Term Rep.* 100). And the deed itself was improper evidence; and if *aliunde*, it must have been by parol, and surely parol may be admitted to contradict it. The error appears to me to have originated in permitting the bill of sale to be given in evidence to

prove the gist of the action of assumpsit, although it may be admissible to prove a collateral fact: and it can be no objection to legal evidence, that illegal evidence had before been admitted.

It is said, however, that this objection ought not now to avail the defendant, because it was not made in the Court below. The answer is, that in any view of it, the plaintiff has not made out the case stated in the declaration.— Admit that the bill of sale was admissible, that, as I before remarked, contains no covenant for a delivery; the not doing of which is the breach assigned. And in the absence of this, there is no proof of such a contract.

The motion ought, I think, therefore, to be granted.

Justices *Nott*, *Gantt*, *Huger*, and *Richardson*, concurred.

Prioleau for the motion.

De Saussure, contra.



BENJAMIN S. HORT vs. JOHN L. NORTON.

In the absence of any contract, the legal presumption is, that the workman is bound to furnish his own tools and machinery.

If a workman be employed to do a particular job, and he choose to do some additional work, without consulting his employer, he can not recover for such work.

THE defendant, by an express agreement, contracted to pay the plaintiff \$200 for superintending the fixing of the mill-stones, pestles, and mortars of a newly erected steam-rice-mill. This sum the plaintiff admitted had been paid; but he claimed the further sums of \$112 50, for twenty-five days superintending the pulling down and erecting anew the frame work, which supported the mill-stones, and \$50 for injuries done to his falls and blocks, implements used in doing the work. The work was done in the absence and without the knowledge of the defendant. The plaintiff consulted, however, with Mr. *Dart*, who advised him to proceed in the work; but who, upon his ex-

amination, stated that he had no authority from defendant to make any contract on the subject.

One witness said, that in his opinion, the original frame work, although new, was too weak to support the superstructure, and that his services, in this respect, was worth the sum charged, and that the injury done his implements, was also equal to the charge.

The jury found for the plaintiff \$112 50, the amount of the charge for extra superintendence.

A motion was made for a new trial, on the ground, that the verdict was contrary to law, inasmuch as there was no contract either express or implied as to this additional work.

Mr. Justice *Johnson* delivered the opinion of the Court.

In the consideration of this case, it will be unnecessary to consider the correctness of the charge against the defendant, for the injuries done to the plaintiff's falls and blocks, as it is manifest from the verdict itself, that the jury disallowed it; and the Court concur with the Recorder, that in the absence of any contract, the legal presumption is, that the workman is bound to furnish his own tools and machinery.

The additional charge for superintending the taking down and erecting the frame work anew, is not, I think, supported by the evidence.

By the contract proved, the plaintiff was to superintend the fixing of the mill-stones, pestles and mortars, which includes, necessarily, all the work immediately connected with them; and that a frame was indispensable, will not be denied. Admit, however, that this view is incorrect, and it follows irresistibly that there was no contract on the subject. The evidence negatives the idea of an express contract, and there is no circumstance from which one can be implied. It was done in the absence and without the knowledge or consent of the defendant; and we have no evidence of his assenting to it at any time, or in any manner whatever: and if an artist be permitted to tax his em-

ployer without his consent, with all the additional work his fancy may suggest, there would be no end to it. It would appear unreasonable, at the first view, that the plaintiff should not be entitled to compensation, tho' the work was not included in the original contract, and was necessary and beneficial to the defendant. And that consideration, probably, induced the jury to find the verdict they did; and but for the principle involved, I should have been disposed to acquiesce. The unreasonableness is not however so apparent, when it is recollected this might have been, and probably was, a work of that common character, which did not require the superintending skill of an artist, and which is usually done at a trifling expense.

The motion is therefore granted.

Justices *Colcock*, *Nott* and *Huger*, concurred.

Mr. Justice *Gantt*, dissented.

LEWIS V. MARTIN vs. SAMUEL MAVERICK.

On a question of the identity of a negro slave, the plaintiff gave evidence that his slave spoke French, and that the one in question spoke French, and described her as being of the *Angola* nation; the defendant may prove that she spoke Coromantee also.

The jury can not be polled, but at the discretion of the Court. (a.)

THIS was an action of trover, for a negro woman called *Sally*, and her children. The plaintiff owned a negro woman called *Sally*, who ran-away from him in June, 1809, which he alleged was the negro now in the possession of the defendant. In an advertisement published by the plaintiff in the *City Gazette*, under date of 1st March, 1810, offering a reward for her apprehension, among other descriptions, she is said to be of the *Angola* country, and to speak the French Creole.

On the part of the defendant, it was alleged that he had been in the possession of this negro from the year 1805, four years before the defendant lost his, and that he had

then bought her on board an African slave ship. And the only question was as to the identity of the negro.

On the part of the plaintiff, *a number of respectable witnesses* swore *unequivocally* and *confidently* that she was the same negro which the plaintiff had lost. And he gave in evidence also, that on a former trial of this case, in the Circuit Court, one of the jury put a question to her, being then in Court, in the French language, which it was said she understood, and answered in the same language.

On the part of the defendant, *a number of witnesses, equally respectable*, with those adduced by the plaintiff, swore with equal confidence that they had known the negro in the defendant's possession, from the time he purchased her in 1805, and had never lost sight of her up to the present time, and that she could not therefore be the property of the plaintiff.

The plaintiff's counsel objected to the defendant's going into evidence, that she spoke the *Coromantee* and not the *Angola* dialect; but the Court overruled the objection, and the witness stated that he knew something of both these dialects, and that they were so different, that those nations could not understand each other, and that he propounded a few questions to her in the former, which she seemed to understand, and gave her answers in the same.

The jury having agreed upon a verdict for the defendant, came into Court and delivered it to the clerk, who read it aloud; and before the verdict was recorded, the plaintiff's counsel moved that the jury should be examined by the poll, and *each personally assent* to the verdict, or deliver such as they had *individually* decided on.

This motion was refused, and the plaintiff moved for a new trial on the following grounds :

1st. Because the Court permitted the defendant to give in evidence that the negro spoke a particular African dialect.

2d. Because the Court refused to permit the plaintiff to examine the jury by the poll in relation to their verdict.

Mr. Justice *Johnson* delivered the opinion of the Court. The first ground of this motion appears to me to be founded in a mistaken view of the character and effect of the evidence, allowed as to that point. It is a good general rule, that the declaration of third persons cannot be given in evidence; and it is universally true, that the declaration of a slave, who, by the policy of our laws, is excluded from giving evidence, are inadmissible. On this principle, the witness would not be allowed to give in evidence the *ipse dixit* of the slave, that she understood and spoke the *Coromantee* language. But when he says, she does understand and speaks that language, it is a fact derived from his own knowledge, and not from her declaration. Language and colour constitute the most marked distinction between the nations of the earth; and where the colour is the same, language is perhaps the strongest evidence. This negro is described by the plaintiff as being of the *Angola* nation; and although her speaking *Coromantee* does not prove that she was not, it is a circumstance, I think, to which the defendant was entitled. It is said, however, that the admission of this evidence operated so as to enable the defendant to manufacture evidence to suit his own purposes; but this objection would go with it to the jury, and they would weigh it according to probabilities deduced from the facilities that existed of disguising such a practice. My own mind is fully satisfied with this view of the subject; but there is another, which I think equally demonstrates that the evidence was admissible, at least in this case.—The plaintiff had before given evidence that the negro spoke French, as a circumstance of identity, corresponding in part with his description in the advertisement; and the evidence now offered, furnished a circumstance, so far as it could have any influence, at variance with the description, so far as related to her being of the *Angola* nation, of precisely the same character, and in direct reply to that given by the plaintiff: and there never was a case in which one party was not at liberty to reply to the evidence offered by the other.

2d. I have examined the subject as to the right of the parties to examine the jury by the poll, in relation to their verdict, with some attention ; but I have not been able to satisfy my mind that there is any rule which binds this Court imperatively to allow it in all cases, at the will of the party ; although the Court may, in its discretion, permit it. It is true that every case must be decided by the concurrence of the whole jury, and the party has a right to satisfactory evidence of this concurrence ; but what shall constitute satisfactory evidence of that fact, must, it appears to me, depend invariably on the usage and practice of the Courts.

Let us then look to our own practice on this subject.—As far back as we can trace the trial by jury, it has been the practice of the Clerk to call over the jury by name on their coming into court, and enquire if they are agreed on their verdict, and he receives from the hands of the foreman a written verdict, endorsed on the record, which he reads aloud, and the tacit acquiescence of the rest is regarded as sufficient evidence of their concurrence ; and this was the mode practised in this case. It is insisted, however, that a party has a right to the expression of the individual opinion of every juror. The answer is, he has it in their tacit assent to the verdict ; for it can scarcely be believed that any one would so far forget himself and the laws of the country, as not to expose any misrepresentation of their verdict agreed on. I confess, however, I have less objection to the thing itself than to purposes to which it might, and probably would be prostituted. It might be used as the means of torturing a weak and dependant juror into a disavowal of a verdict founded on reason and justice : and it would be mischievous in the extreme to allow it in cases sounding in damages, where the verdicts must always be the effect of compromise, rather than the exercise of individual judgment.

It is further insisted that it is necessary as a mean to guard against the misconduct of the jury.

But an ample security, I think, is to be found in the ex-

ercise of the discretion of the Court, in allowing it where there was well-founded suspicions of misconduct. That discretion this Court has always exercised, and no doubt would have done so in this case, had any suspicion been thrown on the conduct of the jury; but nothing of the sort was pretended.

On both grounds, therefore, I am of opinion the motion must be discharged.

Justices *Colcock*, *Nott*, *Huger* and *Gantt*, concurred.

Hunt, for the motion.

Hayne, attorney-general, contra.

(a.) It is the same in cases on the part of the State, as decided in Columbia, May, 1822, in the case of the State *vs.* Allen. R.



J. H. STEVENS *vs.* WILLIAM SIMMONS.

Interest is recoverable upon a replevin bond; and in debt upon a replevin bond, against the security, interest is allowed from the date of the judgment against the principal.

THIS was an action of debt, tried at Charleston, June, 1820, on a replevin bond, to which the defendant was security. The jury found for the plaintiff the amount of rent due, and interest from the date of the judgment against the principal.

A motion was made for a new trial on two grounds:

1st. Because interest is not allowable on a replevin bond.

2d. If allowable, it can only be computed from the return of *elongata*.

Mr. Justice *Johnson* delivered the opinion of the Court.

As between the plaintiff and the principal, there can be no question, that the true measure of damages would have been the amount of the rent due, and interest on it; and if the distress had been returned according to the condition

of the bond, and was sufficient, he would have made it by the sale of the distress. It constitutes the true measure, therefore, of the injury he has sustained, and ought to be the true measure of his recovery. The act of 1808, (*1 Brev. 243,*) makes the security liable for all sums due for rent, whatever may be the value of the distress, and places him in the situation with his principal; and interest is so inseparable from the principal sum, that it constitutes as much a part of the sums due for rent, as the principal itself. The jury, therefore, did right in allowing the interest from the date of the judgment against the principal. They could not go further back, because, all that had previously accrued, necessarily entered into that judgment. The motion is refused.

Justices *Nott, Huger, Gantt, and Colcock*, concurred.

MARY BINGLEY vs. JOHN T. SMART.

A person who has petitioned for the benefit of the insolvent debtor's act, may amend his schedule after it had been filed, unless there be fraud in it.

THE defendant was arrested on a ca. sa. at the suit of the plaintiff, in an action of detinue, for a watch, and petitioned the City Court of Charleston to be discharged, under the prison bounds act. The Recorder reported that his discharge was objected to, on two grounds:

1st. That the schedule rendered in by him did not contain a sufficiency of property to pay the debt for which he had been arrested.

2d. Because he had not returned a watch which belonged to him.

In relation to the watch, the defendant proved that before he applied for the benefit of the act, he informed the plaintiff that upon paying a certain sum, for which the watch was pledged, she might have it, and that she refused; but that she might still obtain the watch on the same condition.

It was admitted on the part of the defendant, that by

the verdict of the jury, the watch, the present subject of dispute, had been determined to be in the possession of the defendant, and that a *fi. fa.* had been lodged against him, and it was therefore insisted, that the defendant could not transfer any property in it to another. But it did not appear whether the watch had been pledged before or after the judgment and execution. The Recorder permitted the defendant to amend his schedule by inserting therein all his interest in the watch, and allowed the defendant to be discharged. A motion was now made to reverse that decision on the grounds,

1st. That the defendant is not entitled to the benefit of the act, because, the watch for which the action was brought, was in his possession at the time the execution was lodged ; and

2ndly. That he should not have been permitted to amend his schedule after it had been filed.

Mr. Justice *Johnson* delivered the opinion of the Court.

These grounds are resolvable into the single question of fact, whether the defendant was guilty of a fraud in not including the watch in his schedule, as originally filed ? For it certainly never was the intention of the Legislature to consign a citizen to perpetual imprisonment, who should from inadvertence, or a mistaken view of his rights, omit to include an article of property in his schedule, in which he had an interest. If there were no fraud in this case, the Recorder decided correctly in permitting him to amend it. On the subject of fraud, it appears to me, that so far from there being any evidence against the defendant, the circumstances go very far to shew that he acted with all imaginable fairness. Before he applied for the benefit of the act, he told the plaintiff that he had pledged the watch, and that it might be redeemed by advancing the money loaned on it. And whether it was or was not pledged for a *bona fide* consideration, has not been made to appear ; nor does it appear whether it was before or after the judgment and execution.

The Court are therefore of opinion that the motion ought to be discharged.

Justices *Colcock*, *Nott*, *Huger*, and *Gantt*, concurred.

Furman, for the motion.

J. P. White, contra.

THE STATE vs. JOSEPH HOLDING.

It is not necessary, in an indictment for attempting to suborn a witness, that the fact which the defendant attempted to procure the witness to swear to, should be stated specifically; as that fact would only be evidence to shew *quo animo*, the bribe was offered, may be shown by other circumstances.

TRIED at Williamsburgh, Fall Term, 1820.

The defendant was tried and convicted on an indictment for attempting to suborn *Thomas Yarbrough* to commit a perjury. The indictment recited that an action of slander was pending and then to be tried in the Court of Common Pleas, for the district of Williamsburgh, wherein the said *Joseph Holding* was plaintiff, and *William Lefrage* and *Isaac Barinow*, defendants, and charged, "that before the trial of the said cause, and during the time the same was depending, to-wit, on the 15th March, 1819, at Kingstree, in the district and state aforesaid, the said *Joseph*, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly contriving and intending, as much as in him lay, to prevent justice and pervert the due course of law, and meaning and intending unjustly to aggrieve the said *Wm. Lefrage & Isaac Barinow*, the defendants above named, and wickedly to cause and procure large damages to be recovered from them, for his own use and benefit, in the suit then in question, between him the said *Joseph* and the said *William* and *Isaac*, then and there, to-wit, on the same day and year last aforesaid, at Kingstree, in the district and state aforesaid, he, the said *Joseph*, did. unlawfully and wickedly so-

licit and instigate, and, as much as in him lay, endeavour to persuade one *Thomas Yarborough* to be and appear as a witness on the part and behalf of him, the said *Joseph*, the plaintiff, as aforesaid, at the trial of the issue joined in the said action so pending as aforesaid, and upon the same trial falsely to swear and give in evidence to and before the court and jury, before whom the said issue should be tried, of and concerning the premises alleged by the said *Joseph* against the said *William* and *Isaac*, whatever the said *Joseph* should require the said *Thomas Yarborough* to swear to, testify and give in evidence, in support of his said action; and the said *Joseph* then and there promised to give the said *Thomas Yarborough* the sum of fifty, or one hundred dollars, if the said *Thomas* would, at the trial of the said issue, before the Court and jury aforesaid, give such evidence as should be directed and fabricated by him the said *Joseph*, so as to enable him to recover damages against the said defendants, when in fact and in truth the said *Thomas* was ignorant of any fact or circumstance in favor of the said *Joseph*, in the said suit; and the said *Joseph* well knew (at the time he so solicited, instigated and endeavored to persuade, procure and cause the said *Thomas* to swear in his behalf as aforesaid,) that he, the said *Thomas* was ignorant of any fact or circumstance in favor of the said *Joseph*, on the trial of the said issue, and that he could not truly swear, as required by the said *Joseph*, and that in truth the said *Joseph* was not entitled to recover any damages in the said action, as aforesaid, to the evil example of all others, &c."

Thomas Yarborough swore, on the part of the prosecution, and stated that he had been summoned as a witness on the part of the defendants in the case referred to in the indictment; and whilst attending the court, the present defendant asked him if he was not subpoenaed as a witness against him, to which he answered yes; he then enquired if witness was not a poor man, and whether fifty or a hundred dollars would not be a great object to him, to which he answered in the affirmative. He then said to the wit-

ness, "if you will relate to the Court what I will now tell you, it shall be as much as fifty or one hundred dollars in your way, or perhaps more." In reply to this proposition the witness told him he would be under the necessity of communicating it to the Court when he was called on, and the defendant swore if he did he would take his life.

For the defendant, several witnesses were called and sworn as to the credibility of the witness *Thomas Yarborough*. The substance of their evidence was, that his character was not so high as to entitle him to implicit confidence, nor so base as to render him wholly unworthy of credit.

In reply to this, several witnesses who knew *Yarborough* stated that they had heard nothing against his character, and they thought him worthy of credit; and one witness, *McCallister*, stated that *Yarborough* had repeated the substance of the evidence now given at his request in the presence of the defendant, who did not deny it; but stated he had not offered him any money; meaning that he had not actually tendered him the cash. And *Bostick*, another witness, stated that the defendant said to him, that they would make nothing of the prosecution, as he had not given any money.

The jury found the defendant guilty, and a motion was made to arrest the judgment, on the ground, that the indictment does not particularly specify the perjury, which the defendant is charged with having attempted to suborn the witness to commit.

A new trial was also moved for, on the ground that the indictment was not supported by the evidence.

Mr. Justice *Johnson* delivered the opinion of the Court.

The witness, *Yarborough*, proved every fact charged in the indictment, and the deductions to be drawn from them as to the *quo animo*, they were committed, as well as his credibility, were questions proper for the consideration of the jury; and the most incredulous cannot, I think, doubt the correctness of their conclusion. The motion for a new

trial must therefore fail. The finding of the jury has fixed the facts charged upon the defendant; and that they were committed *malo animo*, and with the intention of preventing the due course of justice. And the motion in arrest of judgment, involves the question, whether the offence so found, constitutes an offence for which the defendant can be punished *criminaliter*.

For the defendant, it is contended that the indictment should have charged, specifically, the fact which the defendant attempted to procure the witness to swear to, as without it, it could not appear whether it was true or false, and the defendant might therefore be innocent.

The principle I take to be is, that any attempt to prevent the due course of justice is an indictable offence, and punishable *criminaliter*. On this principle, perjury, subornation of perjury, bribery, extortion, rescue, escape, &c. are indictable offences. (1 *Chitty's Crim. Law*, 85.) So in attempting to prejudice the mind of the jury, by distributing hand bills before the trial. (4 *Term Rep.* 285.) And in *Tremain's P. C.* 169. we find the precedent of an indictment for persuading a witness not to give evidence. The fact to which the defendant wished the witness to swear, he was prevented from disclosing by the indignant repulse which the witness gave him, and did not therefore enter into the case; and if it had, it is only a circumstance going to shew the *quo animo*, with which the bribe was offered, and any other circumstances producing the same conviction, as to the intention, is fully sufficient. The indictment in this case does charge the act to have been done with an intention to prevent the course of justice, and on the principle established, it is an indictable offence.

The motion is refused.

Justices *Nott*, *Huger*, *Richardson* and *Colcock*, concurred.

Dunkin, for the motion.

Hayne, attorney-general, contra.

N. G. CLEARY vs. F. G. DELIESSELINE.

An information in nature of a *quo warranto*, will not lie at the suit of an individual, but must be carried on in the name, by the officer, and under the authority of the State. (a.)

THE plaintiff, stiling himself relator, by his counsel, made a motion in the Circuit Court for leave to file an information, in nature of a *quo warranto*, against the defendant, with a view to contest the regularity of his appointment to the office of Sheriff of Charleston district, which he then exercised and enjoyed.

This proceeding grew out of the following state of facts:

In January, 1820, an election was held for Sheriff of Charleston district, at which both the parties were candidates, and on counting the votes, it appeared that the defendant was elected by a majority of thirty-eight votes over the relator, who was the next highest candidate. The relator entered a protest against the election, and a majority of the managers convened, heard the grounds of the protest, and decided in favor of the defendant, and certified to the governor that he was duly elected, who thereupon commissioned him accordingly.

The Circuit Court rejected the motion for leave to file the information, and it was now renewed in this court in the form of an appeal from that decision.

Mr. Justice *Johnson* delivered the opinion of the Court.

The grounds of the present motion embrace an extensive range of objections, relating to the incompetency of a majority of the managers to decide on the grounds of the protest, and the incorrectness of their decision. But it is objected, on the part of the defendant, that whatever may be the merits of this motion, it cannot be investigated in this form of proceeding; as an information in nature of a *quo warranto*, it is insisted, will not lie at the suit of an individual, but must be carried on in the name, by the officer and under the authority of the state; and the Court being

of this opinion, it is not necessary to notice the grounds of the present motion. For every wrong and injury the law furnishes a final and efficient remedy, corresponding with its nature and enormity ; and in order to judge of the fitness of the remedy, it will first be necessary to fix, with precision, the nature and character of such wrong or injury.—The relator, in this case, alleges that the defendant has been commissioned, and now exercises and enjoys the office of sheriff of Charleston district, without having been duly elected according to the laws of the state; or in other words, it is an allegation that he has usurped that office.—If this be a wrong done to the relator, in his individual capacity, he has in this, or some other form, a remedy ; but if it be a wrong done, or an offence against the whole community, it belongs to them and not to an individual to redress it. And the remedy pointed out must be pursued ; for if one individual has a remedy for a wrong, committed against the community, on account of the interest which he has in it, so may each member of it. Judge *Blackstone*, in his *Commentary on the laws of England*, (vol. 4, p. 5,) remarks, that “the distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this:—That private wrongs or civil injuries, are an infringement or privation of civil rights, which belong to individuals, considered merely as individuals: Public wrongs, or crimes and misdemeanors, are a breach and violation of public rights and duties to the whole community, considered as a community, in its social aggregate capacity.”

With this definition before us, I think there can be no difficulty in determining the character of the wrong complained of in this case. The appointment to office is (if I may so express it,) one of the prerogatives of the supreme authority of the state ; and it follows, that any usurpation of it is a public, and not a private wrong, except so far as the individual is affected as one of the community, and that a public remedy ought to be pursued.

So much for the character of the wrong complained of here.

I will now proceed to consider the character of the remedy resorted to.

The proceeding by information in nature of a *quo warranto*, so far as the character of the proceeding itself is involved, is no doubt the legal appropriate remedy ; but the objection in this case is, that it proceeds in the name of an individual, and not in the name or by the authority of the state. The same learned author before quoted (4 *Black.* 312,) in speaking of this proceeding, observes, that it is "generally made use of to try civil rights to franchises, though it is commenced in the same manner as other informations are, by leave of the Court, or at the will of the attorney-general : being properly a criminal prosecution, in order to fine the defendant for his usurpation as well as to oust him from his office ; yet usually considered as merely a civil proceeding." (*Vide also*, 3 *Bacon's Abr.* 635. *Tit. Information A.*) If then the wrong complained of be of a public nature, and the remedy also, it follows that the relator ought not to be at liberty to usurp it to serve his individual purposes. The state have selected from among its citizens men distinguished for their learning and integrity, to whom alone is intrusted the conduct of all public prosecutions ; and the constitution itself provides, that they shall be carried on in the name, and by the authority of the State ; (3 *Art.* 2§. *State Constitution*,) and so far from this being a prosecution of that character, we find the attorney-general, in the ranks of the counsel, opposed to the motion.

It is said, however, that this mode of proceeding was allowed in the case of *Hays vs. Harley*, (1 *Const. Reports*, 271.) The answer is, that no objection was made on that ground, and I well remember, that the objection then occurred to some of the members of the Court, but it was thought better to lay hold of that occasion to decide the important question involved in that case, than to turn the parties around on an objection not going to the merits, especially as the judgment of the Court was not to affect the incumbent. This argument proves, however, that the

court cannot be too circumspect in guarding against deviations from the established mode of pleading; for by passing them over *sub silentio*, we may establish precedents, the consequences of which we cannot now foresee.

This motion is therefore refused.

Justices Bay, Colcock, Nott, Gantt and Huger, concurred,

Hunt and Lance, for the motion.

Gadsden, and Hayne, Attorney-General, contra.

(a.) In the case of *Lawton vs. Hudson*, judgment was arrested on the same ground, during this term, although it was contended that it differed from the above case, inasmuch as the relator claimed the right to be invested with the office, and in the above he did not. See *post*, the cases of the State vs. Dellesseline; Do. vs. Hudson. R.

MISSROON vs. FREAN.

When a person is sued for money received for goods sold by him as vendue-master, he is not entitled to an imparlance.

But whether he acted in the capacity of vendue-master or not, is a question of fact, to be tried by the jury, and not by the Court.

THIS was an action brought to recover from the defendant a certain sum of money, which it was alleged he had received upon the sale of goods deposited in his hands for sale as "vendue-master." The object of alleging that he was vendue-master, was to give the plaintiff a preference on the docket, pursuant to the provisions of the act of the 15th December, 1815.

The defendant denied that he had sold the goods as *vendue master*. And the question was how that fact should be tried?

The presiding judge was of opinion that the question ought to be tried by the Court; and after having heard affidavits on both sides, was of opinion that the defendant had sold the goods in question, as vendue-master, and therefore ordered the case on for trial, on its merits.

The jury found a verdict for the plaintiff; and this was a motion to set aside that verdict, and to give the defendant leave to try the previous question.

Mr. Justice *Nott* delivered the opinion of the Court.

The act of 1815, has two objects in view ; one to give to the plaintiff a summary remedy in the description of cases referred to ; the other to debar the defendant from the benefits of the insolvent debtor's act. It authorizes this Court to make such rules and regulations as shall be necessary to carry its provisions into effect. The plaintiff is not entitled to this summary trial, until it is ascertained that the defendant acted in the character alleged. The Court has never yet directed the manner in which that question shall be tried, and this case furnishes a good opportunity to prescribe the method by which it shall be done. The plea denies the character in which the defendant is sued. It is a dilatory plea which does not go to the merits of the case. Like every other dilatory plea, therefore, which involves a question of fact, it must be tried by a jury. The credibility of the witnesses may be involved, of which the jury are the only competent judges. If the verdict be found for the plaintiff, then the defendant must plead issuably, and go to trial *instantly*, if so ordered by the Court. If for the defendant, then he will be entitled to an imparlance upon the usual terms. If the proceedings should present an issue of law, then to be sure the question must be decided by the Court, and ought not to be sent to the jury. This opinion does not conflict with the decision in the case of *Rocheblanche vs. Cleary & Gieu*, tried January Term, 1820. In that case, in addition to the general issue, the defendants had pleaded that they were not vendue-masters. That was not made a preliminary question, but the two issues were tried at the same time. The jury found for the plaintiff ; but superadded to their verdict, that the defendants had not sold the goods in question, in the capacity of vendue-masters. The plaintiff moved for a new trial, on the ground that the latter part of the verdict was contrary to evidence. The Court held that it was no ground for a new trial, on the part of the plaintiff. In that stage of the proceeding, it was an immaterial issue ; otherwise it would lead to this absur-

dity, that the merits of the question must first be tried in order to determine whether the plaintiff was entitled to a summary trial or not. The Court were of opinion that the question ought not to be tried merely for the purpose of ascertaining whether the defendants would be entitled to the benefit of the insolvent debtor's act. They might never ask for the benefit of it. The time of the Court ought not to be occupied in trying questions which do not affect the merits of the case. It was thought time enough to try that question, when the defendant should apply for the benefit of the act. That part of the verdict therefore was considered as surplusage, and the motion was refused. If on a distinct issue submitted to the jury on the application of the defendant, to try the right of preference on the docket, a verdict should be found against him, perhaps that verdict ought to be conclusive on his application for the benefit of the insolvent debtor's act. Even neglecting to put in such a plea in time, might be construed into an acquiescence of the truth of the allegation. But it is not now necessary to determine what evidence shall be required of the fact on an application for the benefit of the insolvent debtor's act. The plea ought not to be allowed when the only effect will be to guard against a contingency which may never happen.

This is a motion on the part of the defendant for a new trial, on the ground that he has been denied a privilege which the law allows him, of having the preliminary question tried by a jury. The practice has, perhaps, been various heretofore. It ought to be settled, that it may be uniform. This Court is of opinion that an issue ought to have been made up and sent to the jury for trial. And this opinion is in conformity with the decision which has already been made during this term, in the case of *I. C. Moses & Co. ads. Lowden*.

The motion must be granted.

Justices Colcock, Gantt and Huger, concurred.

SOUTH-CAROLINA SOCIETY vs. JOHN JOHNSON, Jun.

Where an officer, who is elected *annually*, gives a bond for the faithful discharge of the duties of his office, his securities are bound *only for one year*, although there is no time specified in the bond, and although he should be re-elected several years in succession.

Though a deed refer to a matter extrinsic, to explain which a resort to parol evidence may be necessary, that does not authorize parol evidence to be given to explain or contradict the deed itself.

TRIED at Charleston, May Term, 1820, before his honor Judge *Colcock*.

This was an action of debt on bond against the defendant, as one of the securities of Mr. *Peter Trezevant*, treasurer of the *South-Carolina Society*. The following are the facts of the case as appear from the pleadings and testimony :

Mr. *Trezevant* was elected treasurer of the *South-Carolina Society*, 4th October, 1808, to fill the unexpired term of *Tobias Cambridge*, deceased. In accordance with the rules of the society, he was re-elected treasurer on the Easter Tuesday of the following year, (1809,) when Colonel *Johnson* became his security. He was re-elected on the Easter Tuesday of every succeeding year, until the year 1814 ; but no new bond was taken at any re-election. Mr. *Trezevant* regularly accounted with the proper officers of the society, whenever he was required by them; until August, 1813, when, upon examination by the committee of accounts, a deficiency of \$2332, was detected. It further appeared from the minutes of the society, that on the 31st August, 1813, the society demanded of Mr. *Trezevant* a new bond, with securities, for the term of the last election ; or that in addition to that given on his first election, his securities should stipulate for the faithful discharge of his duties as treasurer, under his then present or any future election ; the bond on which the action is brought being thought invalid after the first election. This proposition was however rejected by Mr. *Trezevant* and his securities. No defalcation had taken place prior

to August, 1813, when it was reported to the society by the chairman of the committee. Mr. *Trezevant*, continued in office until October, 1813, when he sent in his letter of resignation, which was accepted.

Mr. *Bee* was brought forward as a witness, and was objected to on the ground, that he was an officer and corporator of the society; which objection was over-ruled, and he testified to the following facts, viz. That new bonds on the re-election of the same person had not been previously required, and that the officers take the bonds, and do not report the securities to the society; that they did not in this case, nor in any on the minutes of the society; that it was not the practice to take new bonds; but it was not the understanding that new bonds should not be taken.

The testimony relative to the practice of the officers not to take new bonds, was objected to by defendant's counsel, on the ground that the rules of the society require an annual election of the treasurer, and that any practice or negligence of the officers could not regulate the legal liability of the defendant, or extend his responsibility beyond the year; and further, that it was parol testimony which went directly to contravene the rules of the society and the legal implication arising therefrom. This objection was likewise over-ruled by the judge, and the testimony went to the jury, and was used by his honour as an argument against the defendant.

Mr. *Alexander*, one of the society, was also examined, and stated that no defalcation had taken place, until August, 1813, when he made the report to the society, that Mr. *Trezevant* had regularly accounted with him every year, that the committee were satisfied, and that Mr. *Trezevant* was balloted for every year as a new candidate.

Mr. *Toomer* proved, that though a member of the society, he never knew securities discharged by the society.

A motion was then made for a non-suit, on the ground that the bond executed by Mr. *Trezevant*, at his first election as treasurer, cannot bind his securities for any default or neglect of duty after the first term of service, and under

a subsequent appointment by the society. This motion was, however, refused by the Court, and the case went to the jury.

The Judge, after stating the testimony, and the rules of the society, charged the jury, that the intention of the parties was to govern, and that this was to be gathered from the bond, and from the nature of the duties of the office.— He then remarked that no man could doubt the meaning of the bond ; it first states that he was treasurer, and nothing appears from the paper which shews he was not to be so for twenty years. It also states, that he is to account whenever required, and in every matter and thing, shall faithfully discharge his trust as treasurer, without saying a word about the time. He then stated the subject matter, viz : an undertaking by the principal to act as treasurer ; and read the 6th rule, requiring an annual election of the treasurer ; and the 14th, that the present, and every future treasurer, should give bond and security. He said that the meaning of the last rule was, that Mr. Trezevant should now give bond, and when another man is elected, he shall be a future treasurer. The custom of the society, he said, was known to defendant, or he should have known it, and it would be contrary to common sense to suppose that he did not know it ; and this operates conclusively to fix him for the defalcation. He then enumerated the classes of cases quoted by defendant's counsel, and said there were three :

1st. When the specific time was mentioned, and which he conceived was inapplicable to the case before them.

2d. Where the contract was entered into by one, and the parties were afterwards changed.

3d. Securities of public officers are not liable for a defalcation beyond the time of the original appointment, yet the defendant was. The difference between public and private officers, he stated to be these :

1st. One is liable to the whole community, the other to private persons.

2d. Public officers cannot be turned out, private can be,

3d. The security of a public officer has no opportunity to investigate the conduct of his principal, but defendant had.

He admitted that the case in *Bos. & Pul.* quoted in favor of defendant, was directly in point, but that he would not be governed by it, as the decision appeared to him erroneous. He further told the jury they could find a verdict against defendant, (one of three securities) for the whole amount of the defalcation, with interest from the date of the account, rendered by Mr. Trezevant, which they accordingly did.

A motion was now made to reverse the decision of the Circuit Court, and for a nonsuit on the ground taken before the Circuit Judge, and which has been already stated in this brief.

Mr. Justice *Nott* delivered the opinion of the Court.

I have taken the brief which has been delivered by the counsel for the defendant, as containing a correct report of this case. The several questions growing out of it, which have been submitted to us in the course of the argument, are as follows :

1st. Whether the legal effect of the bond in question is to make the defendant liable, after the expiration of one year; being the period for which Mr. *Trezevant* was first elected, when he became his security?

2nd. Whether parol evidence was properly admitted to show the intention of the parties; and if it was, whether it has given the bond a more extended operation than would otherwise have been given to it?

3rd. Admitting Colonel *Johnson* to be bound only for one year, whether there was not sufficient evidence before the jury to sustain the verdict; at least for a part, if not for the whole?

The condition of the bond is in the following words :
" The condition of the above obligation is such, that if the above bound *Peter Trezevant, John Johnson, jun., Charles B. Cochran, and Hugh Patterson*, their certain

attornies, heirs, executors or administrators, or any of them, shall and do well and truly deliver in good order unto the above mentioned *South-Carolina Society*, whenever the same shall be demanded or called for, at any of their regular meetings, (fire and like unavoidable accidents excepted,) the several bonds, notes and sums of money, with the silver plate belonging to the *South-Carolina Society*; which bonds, notes, plate and sums of money are for greater certainty specified and contained in a schedule, dated the thirteenth day of January, 1809, and subscribed by the said *Peter Trezevant*, and delivered to *Thomas Roper*, esquire, the present steward of the said society; and also, shall at all times, when required, render a true and faithful account of the monies from time to time that shall be delivered to him by the said society, or received by him in their behalf, and in every matter and thing faithfully shall discharge his trust as treasurer of the said society, then this obligation to be void and of no effect, or else to be and remain in full force and virtue."

It does not appear upon the face of this bond, for how long a time its obligation was intended to continue. But its object appears to be to secure the faithful performance of *Mr. Trezevant's* duties as treasurer of the *South-Carolina Society*. The duration of the bond, therefore, must be determined by the duration of the office. By a reference to the rules of the society, it appears that the treasurer was elected only for one year. The legal operation of the bond therefore cannot be carried beyond that period. Neither can it be extended by the accidental circumstance of his having been re-elected. It must continue to have the same construction as would have been given to it, at the time of its creation. Such, I think, would have been its construction upon principle, without regard to authority. But it is amply supported by authority. (2 *Saunders*, 411. *Wright vs. Russell*, 3 *Wilson*, 530. *Barker vs. Parker*, 1 *Term Rep.* 287. *Strange et al. vs. Lee*, 3 *East*, 484. 4 *B. & P.* 34, 40. *Pro. Liv. Wat. Works vs. Harpley*, 6 *East*,

507. 5 B. & P. 174. 2 Maule & Selwyn, 363. *Com. Accounts vs. Greenwood*, 1 Eq. Rep. 452.)

It is true that in most of those cases, the term of office is expressed in the bond, or may be inferred from its language and provisions. But whether it is expressed in the bond, or fixed by law, cannot make any difference; and the rules of this society are the law to all the members belonging to it. The case of the *Commissioners of Public Accounts vs. Greenwood and others*, (1 Eq. Rep. 450,) is directly in point. The defendant had been security for the treasurer of the State, who had been elected annually. There was no time mentioned in the bond, and the Court of Equity held that he was not bound beyond the first year. A distinction is attempted to be made between an office of a public nature, and a private office of a self-created society. Every member of the State, it is said, is supposed to know the laws of the State. But it may be answered, that the members of every society are presumed to know the laws of that society. The strongest case in favor of the plaintiff, is the case of *Hughes vs. Smith and Miller*. (5 Johnson, 168.) That was an action brought by a sheriff on a bond given for the faithful performance of the duties of a deputy sheriff, by one of the defendants, "as long as he should continue in that office." The sheriff had been re-elected after taking the bond, and the deputy had been continued in office, without any new appointment.— The question was whether the bond continued to be obligatory after the re-election of the sheriff? The Court held that it did; because, although the sheriff was re-appointed, the deputy was not, neither was it necessary that he should be. His office continued on uninterrupted, and therefore the bond continued operative. The grounds of that decision were, that as there was no point of time when the sheriff was not actually in office, the office of the deputy did not cease with the expiration of the term of office of his principal. With all the respect due to the able bench of New-York, I am not prepared to say that I should

concur with that decision. But it is deducible even from that case, that if the office of the deputy had expired with that of his principal, or if he had actually been re-appointed, the obligation of the bond would have ceased. I think therefore, that the defendant was not bound beyond the first year that Mr. Trezevant was in office. On the second ground, the amount of the argument on the part of the plaintiff is, that the bond on its face does not appear to be limited in its duration. The defendant therefore is obliged to resort to parol evidence to fix its limits, and that permitting the defendant to go into parol evidence, opens the door for the plaintiffs to go into similar evidence to shew the intention, and that the intention must prevail, even though it be contrary to the language of the deed itself.— But I think the counsel is mistaken, both with regard to the facts and the conclusion which he has drawn from them. We cannot, to be sure, from the bond alone, ascertain the period of its duration. Neither can we ascertain that there has been a breach of the condition. The first resort to parol evidence then is, on the part of the plaintiff, to shew a breach of the covenant contained in the condition. The object of the testimony on the part of the defendant is, to repel the proof adduced by the plaintiff, by shewing that the bond had become a dead letter before the breach assigned could have happened. But it is not parol evidence. He relies on the constitution of the society, which, in relation to every thing affecting the members of the society, is as high evidence as the constitution of the State.

But suppose the defendant had proved the same fact by parol, the conclusion attempted to be drawn from it would not follow. Wherever a deed refers to any thing extrinsic or foreign to the deed itself, it must be established or identified by parol evidence. Thus for instance, where a conveyance or grant of land calls for certain marks or monuments as evidence of its metes and bounds, those marks or monuments can be identified only by parol evidence :

such evidence would be consistent with, and not contradictory to the deed. It certainly would not authorize the opposite party to go into evidence to shew that the intention of the parties was different from the legal import of the writing itself. If a person should enter into a covenant to deliver to another all the cotton which he had in a certain ware-house in Charleston, it would be necessary to shew by parol evidence how much cotton he had in that ware-house at the time. But that would not make it competent for him to shew that he meant a part and not the whole ; or for the other to shew that he was bound to deliver all that might be in the ware-house at any indefinite period afterwards. So where by the production of parol evidence, one part of a deed is made to appear inconsistent with another part of the same deed, that inconsistency or ambiguity thus raised may be explained by the same kind of testimony : As if a grant should call for a line running south to a particular river, which should be found on the north, it might be explained by parol evidence ; because the river itself as well as its relative position to the land, would be a part of the description. But that would not give a license to shew that it was the intention of the parties to extend the line a given distance beyond the river. The intention ought to prevail ; but then it must be collected from the deed itself. A deed may be couched in language so strong, as to control the legal effect of technical terms in aid of the intention of the parties ; but it cannot be altered or explained by parol evidence, except where an ambiguity has been raised by such evidence, and then only to remove that ambiguity. I think therefore that the evidence offered to shew the intention of the parties ought not to have been received. I do not think, however, that it altered the complexion of the case ; it merely went to shew that the society had neglected to renew the bond at each annual election. But it does not follow, that because the defendant was a member of the society, he must have been acquainted with that fact. Neither is it material

whether he was or not; it could not alter his responsibility; he certainly did know that his principal was elected for one year only, and it is reasonable to presume, that he as certainly concluded that his liability ceased at the expiration of the year.

I come now to the last question which has been submitted to our consideration. If it were doubtful whether the delinquency might not have happened during the first year that Mr. Trezevant was in office, the case ought to be sent back to another jury. But the testimony satisfactorily removes that doubt. The part of the bond in which the breach is assigned, is in these words, that he "shall, at all times, when required, render a true and faithful account of the monies from time to time, that shall be delivered to him by the said society, or received by him in their behalf." It appears by the evidence presented to us, that he did render a true and faithful account, according to his covenant, at the expiration of that year. It also appears by the accounts of his successor, that all the monies were paid over to him. He was indeed his own successor, and acknowledged the money in his hands, and the society appears to have been satisfied with his accounts for several succeeding years. It is apparent, therefore, that the defalcation happened several years after the liability of the defendant ceased to exist. The action ought not to have been sustained, and the motion for a non-suit must be granted.

Justices *Bay, Gantt, Richardson* and *Huger*, concurred.

McCall and *Hayne*, Attorney-Gen. for the motion.

Simons and *Waring*, contra.

MILLER vs. THE EXOR'S OF FISK.

Where the plea of the statute of limitations has been put in, after a cause had been several Courts at issue, and it does not appear that notice to the opposite party had been given, nor the leave of the Court obtained, it may be stricken out on motion.

THIS was an action of assumpsit, tried at Charleston, Spring Term, 1820. The cause had been between three and four years at issue, when the defendant's attorney, without any notice to the opposite party, tendered the plea of the statute of limitations, which was filed by the clerk. As soon as the plaintiff's attorney discovered that such a plea had been filed, (which was at the same Court, and about the time the cause was called for trial,) he moved to have it stricken out, as having been filed without leave of the Court. It did not appear by the journals that any such leave had been given; but the plea in the usual form stated that leave had been obtained.

The presiding judge ordered it to be stricken out, as having been irregularly filed.

The cause was then tried on the general issue, and a verdict obtained for the plaintiff.

This was a motion for a new trial, and to restore the plea which had been stricken out, on the ground, that the filing of the plea by the proper officer of the Court, was presumptive evidence of its regularity, and the order to set it aside, operated as a surprise on the defendant.

Mr. Justice *Nott* delivered the opinion of the Court.

A defendant is not authorized to plead double without leave of the Court, first obtained for that purpose. I have no doubt but that such leave is often obtained without being entered in the minutes of Court. And when a plea had been filed in due time, and particularly when the circumstances authorized a belief that it had been acquiesced in by the opposite party, I would always presume it had been done with leave of the Court. But the circum-

stances of this case furnish no such presumption. The proper time to obtain leave to plead double, is the first Court after the filing of the declaration. But I have never known it allowed at any subsequent Court, unless the cause had been previously continued over to the succeeding term; nor even then without giving notice to the opposite party to shew cause to the contrary. In the present case, the presumption is either, that no leave had been given to plead double, or that the privilege had been waived until it was too late. If the leave had been obtained at any antecedent Court, the defendant had forfeited his right by delay. He had no right after such a lapse of time to surprise the plaintiff with an unexpected plea in bar. If it had been obtained during that term, it would in all probability have been recollected. Indeed it cannot be presumed that any Judge would give a party leave to put in such a plea three years after the cause had been at issue, when it was ready for trial, and at the very moment when it might be called. I have little doubt that if such an order had been made under such circumstances, this Court would order it to be rescinded. It is a practice which can never be allowed, that after the necessary delay usually occasioned by the accumulated business of Charleston, a defendant should be permitted to force the plaintiff to another continuance, by putting in a special plea in bar, which he could not be prepared to answer. If the defendant has suffered any injury in this case, it is his own fault. Although living in Charleston almost within hearing of the cryer's voice, he has suffered four years to elapse without instructing his counsel in his defence, or even informing himself of the nature of the demand on which he was sued,

The motion must be refused.

Justices *Colcock* and *Gantt*, concurred.

Justice *Richardson*, dissented.

THE STATE vs. FRANCIS G. DELIESSSELIN.

An information in the nature of a *quo warranto* is not void, merely because it is filed by the order or directions of the Court.

On an information in the nature of a *quo warranto* against a person, to show by what authority he claims to exercise the office of sheriff, the decision of the managers is conclusive as to all matters legally submitted to them, as long as that decision remains unreversed.

A majority of the managers is a *quorum* to try the question; and the concurrence of a majority of that *quorum* is sufficient to decide it.

An information in the nature of a *quo warranto*, may be filed against an officer who holds a commission under the authority of the State.

If appeared in this case that an election had been held for sheriff of Charleston district, pursuant to the act of 1808, (*2 Brevard*, 225,) which transfers the election of sheriff from the Legislature to the people. Upon counting out the votes, the defendant was found to have a majority.

Mr. *Cleary*, the opposing candidate, gave notice, according to another provision of the same act, that it was his intention to contest the election.

The managers, who are constituted the tribunal to try the question, were accordingly convened for that purpose. Upon an investigation of the matter, they came to the conclusion, that the defendant had been duly elected, and gave a certificate to that effect; upon which the governor granted him a commission. An application was then made to the Attorney-General, on behalf of Mr. *Cleary*, for an information, in the nature of a *quo warranto* against the defendant, to shew by what authority he claimed to exercise the office of sheriff of Charleston district. The Attorney-General made out an information which contained the following suggestions or grounds, on which the information was predicated:

1st. For that a majority of the managers assembled at Charleston, but only a minority of the whole number of managers, and a small minority objected, decided, and refused to receive the testimony of any person who voted, although he voluntarily offered or proffered his testimony

to shew or establish the fact, that he voted without being legally qualified.

2d. For that said minority of said whole number of managers refused to receive evidence that persons had declared, subsequently to their voting, that they were not American citizens, and that they were not entitled to vote at the election aforesaid; thereby, contrary to all rules of evidence, excluding the confession of a person to shew that he had acted incorrectly, and not permitting a man to be convicted or condemned by the words of his own mouth.

3d. For that, although, the grounds for the protest were furnished as the law directs, and one ground was, that there were more bad votes given than Mr. *Delesseline's* majority was over the next highest candidate, yet all testimony was precluded by a majority of the whole number of managers from proving a number of bad votes; because the said votes were not contained in the list rendered in on Saturday evening, the 15th of January, one thousand eight hundred and twenty; against which rule, as it respects the limitation of time for furnishing said list, *Nathaniel Greene Cleary*, one of the opposing candidates at the time, protested, and by his counsel, stated that he objected to the whole of the votes.

4th. For that a number of paupers, not less than seven, who received a support from the poor-house, in the city of Charleston, and although objected to, were decided to be good voters; and also, a number of persons, not less than ten, who were but transiently in the state, and had never any fixed residence on the shore in the state, but were fishermen from Grotan, in the state of Connecticut, who came here in the autumn of each year, and returned in the spring or early part of the summer of each year, with their smacks or small vessels, to the said town of Grotan, in Connecticut, where they and their vessels belonged; and when at the southward, which was not more than about six or seven months in any one year, they were not more than one half of the time even in the port of Charleston; yet, though objected to, their votes were decided to be good; none of

the aforesaid persons having any freehold property in the district or state aforesaid.

5th. All the persons who were managers were not present at the time of the declaration of the election; none but a small majority of the whole number.

6th. For that at many of the places where the election was held, not more than one of the managers was present. And at one place, to-wit, at St. James's, Goose-creek, the poll was not opened until the second day of the election, and then at about eleven o'clock; and when opened, was opened at the distance of from four to six miles from the place of election, where a vote or votes were received; and, in the whole, at this place, were twenty-six votes received, which were decided to be good votes.

7th. At many of the places of election, the Attorney-General aforesaid, the relator, on behalf of the State, has been informed that it was proved before the managers of election, that the polls were closed; the boxes, bottles, or phials, in which the votes were received, were not sealed according to law, nor closed and opened in the presence of two witnesses, electors, called for that purpose, as the law directs.

8th. For, that neither of the managers at St. James's, Goose-creek, attended at the court-house in Charleston, nor from one other place or poll, to count the votes received at the poll or polls. But one of the managers held the poll, or sent the bottle or phials in which the votes were received by a third person, to the court-house, to have the votes counted. Nor did any manager attend from that place or those places, to decide upon or declare the election.

9th. For, that the return signed or certified to the governor, was declared returned and certified by a small minority of the whole number of the managers of the district, to-wit, but by fifteen; one of whom, together with six others who were present, protesting against the legality of such return, when in fact there are thirty-nine managers for the district, a majority of whom ought to have met and concurred in deciding and declaring the election.

10th. For that at one or more of the polls, the managers were not sworn at all to manage the election, and at other places, sworn by persons not authorized by law to swear them.

11th. For that many persons who were proved to be born in Europe, were permitted to vote; and when proof was adduced to this fact, their votes were decided to be good, although they produced no certificate or proof of their naturalization.

12th. For that the managers determined that there were twenty-five votes received from persons not entitled to vote in this district, exclusive of the twenty-six votes taken at St. James's, Goose-creek, where the poll was opened at a distant place from that appointed by law, and that only for one day; and no manager attending from that place to count the votes or decide the election, and the poll opened by one manager, and the bottle or phial in which the votes were received at the opening and closing, was not sealed in the presence of witnesses; which twenty-six votes, added to the other twenty-five votes declared bad by the managers, would make fifty-one bad votes, which is more than *Francis G. Deliesseline* had over the said *Nathaniel Greene Cleary*, the next highest candidate.

13th. Many of the managers who decided on the election, were not sworn in according to law. Having prepared the information ready to be filed, he made the following endorsement thereon: "In this case a majority of all the managers of the election for sheriff of Charleston district, did assemble for the purpose of declaring the election according to law. Before the board of managers so assembled, Mr. *Cleary* appeared by his counsel, and as soon as it was ascertained that Mr. *Deliesseline* had the greatest number of votes, he contested his election, on the grounds, (substantially,) which are now taken in this information. The managers heard evidence and argument on both sides, and finally decided, by a majority of the managers assembled, in favor of Mr. *Deliesseline's* election. The same majority certified the

election to the Governor, who commissioned Mr. *Deliesseline* accordingly. I have been required by Mr. *Cleary* to exhibit this information in the name of the state. But having been originally engaged as counsel for Mr. *Deliesseline*, I am unwilling, (though no longer his council,) to decide on Mr. *Cleary's* rights; and as the constitutional court have declared in their decision. that the proceeding must be instituted by "the leave of the court, or at the will of the Attorney-General," I think it proper to refer Mr. *Cleary* to the court, to ask leave accordingly." Application was therefore made to Judge *Bay*, who presided in the court below, and the following order obtained:

"After hearing counsel on both sides, I am of opinion that the relator should have leave to file this information as of this day, May 11th, 1821."

This was a motion to reverse that order on the following grounds:

1st. That the court ought to refuse an information in behalf of the state, to the Attorney-General, because he may grant it himself.

2d. That *Francis G. Deliesseline* is the sheriff of Charleston district, having been duly commissioned by the executive, upon the certificate of a majority of the sitting managers of election, who, being a quorum or majority of the whole, were competent to hear and decide, and did, by a majority of the sitting members, decide the contested election, in favor of Mr. *Deliesseline*, whose decision can not be reversed by an information in the nature of a *quo warranto*, against the present incumbent.

Mr. Justice *Nott* delivered the opinion of the Court.

I consider it unnecessary to examine the numerous authorities resorted to by the counsel in this case for the purpose of ascertaining the powers of the Attorney-General, in relation to the granting of informations. It appears that in England informations are of two kinds. Those filed *ex-officio*, by the Attorney-General, (1 *Chitty Crim. Law*,

843,) and those which, by leave of the court, are prosecuted in the name of the coroner, or master of the crown office. In those carried on by the Attorney-General, *ex-officio*, and on his mere motion, it is not usual for the court to interfere: But where they are filed at the instance of any individual, it is usual to obtain leave of the court. (*Rex vs. William Davis Phillips*. 4 Burrow, 2039. *The same vs. Phillips et al*. 3 Do. 1565.) In this state, I apprehend, all informations must be carried on in the name of the Attorney-General or solicitor. And it is at least doubtful whether under our constitution, any information for a misdemeanor purely of a public nature, and not to try some private right, can be sustained. When I speak of a private right, I do not mean the right of the party applying for the information only; but of the person accused, who may not only be punished for the misdemeanor, but ousted of his office. But be that as it may, I have no doubt but that the Attorney-General may, in any case, apply to the court for directions, and that the court, although, perhaps, it cannot order, may aid him with its advice. There may be many cases where it would seem peculiarly proper, and some where it would be absolutely necessary, that it should be done. The Attorney-General may stand in such relation to the party against whom an information is required, as not to be able to trust his own judgment; or in such that it ought not to be trusted by the State. Such a proceeding might be required against the Attorney-General himself, in which case he could not act. I am satisfied, therefore, that the course which has been observed on this occasion has been proper and correct, and the only one perhaps, which, under all the circumstances of the case, ought to have been pursued.

Speaking of the several kinds of information, *Bacon* says, informations in the nature of a *quo warranto* may be, and frequently are exhibited with leave of the Court for usurping privileges, franchises, &c. (3 *Bacon*, Title Information A.) But the fact of having obtained leave of the Court,

does not necessarily imply that it was done against the consent of the Attorney-General. Indeed I consider the information in this case as filed with his leave. The act of referring it to the Court was giving his consent, if, in the opinion of the Court sufficient grounds were exhibited.

2d. Under the second ground, a variety of distinct questions have been submitted :

1st. Whether the merits of the case ought to be heard on the application for an information, or should be reserved until the answer of the defendant be filed.

2d. Whether an information, in the nature of a *quo warranto*, may be granted against an officer commissioned under the authority of the state, or only against officers of corporations ?

3d. Whether the tribunal for the trial of contested elections ought to be composed of all the managers, or whether a majority constitutes a *quorum* for that purpose ?— And if a majority, whether the concurrence of a majority of the sitting members be sufficient to make a decision, or whether a majority of the whole must concur ?

4th. Whether the decision of that tribunal is conclusive upon this Court ?

1st. On an application to the discretion of the Court for an information in the nature of a *quo warranto*, the grounds of the motion must be distinctly stated ; and the party against whom the proceeding is requested ought first to be served with a rule to shew cause. (*3 Bacon, Title Information D.*) The motion in this case must be considered in the nature of a rule to shew cause. If, admitting the truth of all the allegations contained in the suggestion, there is no ground on which the prosecution can be sustained, the information ought not to be granted ; and that question can as well be tried on the rule to shew cause, as on the information. In a question of this sort, where the public interest, as well as that of the individual, may be deeply concerned in the speedy decision of the question, the Court will avail themselves of the earliest opportunity to effect the object. If the suggestion contain suffi-

cient matter to authorize an information, the Court ought to grant the motion, without having the merits discussed. All the grounds stated in this suggestion relate to questions which were decided by the managers, while acting in a judicial capacity; except that which relates to the organization of the Court itself. Whether the question ought to be decided at this stage of the proceeding, will depend then upon the view which the Court shall take of the third and fourth grounds above stated.

2d. On the second question, I shall make but few observations in addition to what I have said on that point, in the case of *Green and Shackelford*, decided in this Court. (*Vide also the King vs. Mein, 3 Term. 598.*)

Were it even admitted that informations in the nature of a *quo warranto* are, in England, confined to officers of corporations, it would not follow that such a proceeding may not be had here to try the right of an officer commissioned under the authority of the State. In our republican government, the power of appointment is a delegated power. It is seldom accompanied with the power to remove. The right of sovereignty here is in the people, and not in the executive. The usurpation of an office is not an invasion of executive prerogative, but of the rights of the people; and the only method by which their rights can be protected, is through the instrumentality of the Courts of Justice. If the appointing power violate the constitution or the law of the land, it belongs to this Court to correct the evil. In the case of *Hays and Harley*, the Court declared the act of the Legislature, under which *Hays* was elected, void and ousted him of his office; and in the case of the *State vs. Jeter*, who was elected by the Legislature, the Court allowed this proceeding for the purpose of trying the constitutionality of his election. The constitution is the supreme law of the land, equally obligatory upon the Legislature and individuals; and if a person is inducted into office by an unconstitutional law, this Court will declare it inoperative and void.

3d. The next is a more important and difficult question

to decide. Whether a delegated authority should be exercised by all the persons to whom the power is delegated, or by a majority, does not appear to be settled upon any fixed or established principle. It would seem to me that it must always be a question of expediency or necessity, or of positive compact. I think however, that it is now pretty well understood that where a trust is of a public nature, a majority may act for the whole. (*The King vs. Beeston*, 3 Term R. 592. *Grindley vs. Barker*, 1 Bos. & Pull. 229. *Green vs. Miller*, 6 Johnson, 39.) In cases where the body consists of an indefinite number of persons, as in all democratic governments, a majority from necessity must govern. The same necessity exists (if not to the same extent) in all numerous bodies. Mr. *Locke* says, "where any number of men have consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein a majority have a right to act and to conclude the rest." 2d vol. 255, § 95. Because, he says, the "consent (of the whole) is next to impossible ever to be had, when we consider the infirmities of health and avocations of business, which in a number, though much less than that of a commonwealth, will necessarily keep many away from a public assembly." *Id.* § 98. See also *Grotius*, 204, B. 2, C. 5. 1 *Brown's Civil Law*, 147. 2 *Rutherford's Institutes*, 1, 2. It seems also to be congenial with the spirit and practice of all our republican institutions. The constitution of this State and of the United States, require only a majority to constitute a *quorum* to do business, and I presume that rule would have been adopted, if they had been silent on the subject. I will mention one other body, which, from the persons and characters of whom it is composed, is of no inconsiderable authority. I mean the *Board of Trustees of the South-Carolina College*. That Board consists of twenty-nine members; but the act establishing the Institution constitutes eleven a *quorum*, to transact the most important business within their jurisdiction. All the reasons which exist for adopting such a rule in the cases above ad-

luded to, apply in full force to the case now under consideration. The act ought to have such a construction, if not inconsistent with its letter or spirit, as will give it a practical operation. The number of managers at the several places of election in this district, amount to thirty-nine. The act provides that, "if any person shall be disposed to contest the election of any person so elected sheriff, he shall, on the day on which the votes are counted over, and the election declared, signify his intention in writing so to do to the managers, and the ground on which he intends to contest the same. And the *said* managers shall thereupon, and they are hereby authorized to hear and determine such contested election so to them stated; provided, that no manager shall be permitted to sit upon the hearing and determining any contested election, wherein he may have been a candidate for the office of sheriff; and in case such election shall not be declared void, the said managers shall certify to the governor the person who is elected, who shall be commissioned in manner aforesaid. (2 *Brevard*, 226.) The language of the act seems to require the construction which has been given to it. The person intending to contest the election, is required to signify his intention to the managers on the day the votes are counted over, which must necessarily mean the managers who have convened for that purpose. It could not be intended that he should give notice on that day to those managers who might be thirty miles off, or even out of the district at the time. It seldom happens that all the managers *can* attend, and it is a matter of public notoriety, that it more seldom happens that all *do* attend for the purpose of counting over the votes. The *said* managers, (which must mean the same managers to whom the notice was given) are also authorized to hear and determine the same. The object of the act is, to insure a prompt and speedy decision of the question. If the attendance of all should be required, the death, sickness, or absence of one from any other cause, would defeat the election, whenever it should be contested; or even when there should be no contest, if

it requires the whole number to count the votes. The difficulty of getting so many together, repels the idea of such a construction. The delay which it would almost necessarily produce would leave the district half the time without a sheriff, or cast the appointment on the governor; and according to the decision which has just taken place in the case of the *State vs. W. M. Hudson*, (*post*) an appointment by him, must continue for the whole constitutional term of office. Such a construction, therefore, would almost amount to a repeal of the act. The conclusion then follows, that a majority must constitute a *quorum* to transact the business; and that decision is conclusive of the other question. For, according to the principle of all the cases referred to, a *quorum* possesses all the powers of the whole body; a majority of which *quorum* must of course govern. It is no where laid down that the majority must be unanimous, but that they may act and decide. Thus *Grotius* says, (*ut supra*,) though there were no contracts or laws that regulate the manner of determining affairs, the majority would naturally have the right and authority of the whole; so in 2 *Rutherford*, B. 2, c. 1, § 5, those who are absent are understood to devolve their power of voting upon those who do attend; and that also is conformable to the general principles of our government. The constitutions of this State and of the United States, declare that a majority shall be a *quorum* to do business; but a majority of that *quorum* are sufficient to decide the most important question. It has already been stated that eleven constitute a *quorum* of the Board of Trustees of the College, which is composed of twenty-nine members. Six constitute a majority of that *quorum*, and the concurrence of that number, when only eleven are present, has always been held conclusive on the whole body. In the case of *Rex vs. Foxcroft*, (2 *Burr*. 1017,) the whole number of electors was twenty-five; out of that number twenty-one assembled pursuant to summons. A particular person was nominated, for whom nine voted. Eleven refused to vote at all. The person who received the nine votes, was held

duly elected. Lord *Mansfield* said, whenever electors are present, and do not vote at all, they virtually acquiesce in the election made by those who do. And Justice *Wilmot*, in the same case, mentioned the case of *Rex vs. Withers*, where, out of eleven voters, five voted and six refused; the Court held that the six virtually consented. See also the case of *Sir Robert Salisbury Cotton vs. Davies*, 1 *Strange*, 53, where it was held that a majority of the number present, was sufficient. It appears, therefore, that whether we consider the case upon principle or authority, we are led to the same result. Twenty constitute a majority of the whole number in this case. If a majority of the whole number be required, and a bare majority meet, they must be unanimous. But whether they would be unanimous or not, could not be ascertained until the case had been heard, and their opinions pronounced. If they should not agree, a second Court must be organized with all their prepossessions, and with the same uncertainty with regard to the result. Indeed the hopeless expectation of unanimity in such a body, where the least doubt could be excited, renders it equally expedient and necessary that the concurrence of a majority only should be required.

This brings me to the last question involved in this inquiry; and that question has been clearly and distinctly settled in the case of *Grier & Shackelford*, from Georgetown. It is not now a question whether it was then correctly settled. The importance of adhering to the decisions of this Court is becoming more and more manifest every day. A greater evil can scarcely attend a country, than that the decisions of a Court of the last resort should be unstable and fluctuating. The very object of such a Court is to give certainty to what was before uncertain.— Its decisions become a rule of property, and a rule of conduct, and ought to receive such support as to secure to them the unshaken confidence of the community. The character of this court has suffered from a mistaken notion which has been entertained, that the Judges have not paid sufficient respect to their own decisions. I feel authorized

to say that it is a mistaken notion ; because, after ten years experience, I have known but one case where the Court has undertaken to review and reverse a former decision. The case of *Rose & Daniel* was reviewed and overruled by the case of *Fasoux & Prather*, (1 *Nott & McCord*, 296.) But it is to be observed that the case of *Rose & Daniel* was not finally disposed of when the latter decision took place. It will also be further recollected that the revision of that case was not effected by an appeal brought up by counsel, but by a question reserved at the special instance and recommendation of a very learned and influential member of the bench. And the Court yielded to it from the respect due to one so well entitled to their respect, and who justly possessed, in an éminent degree, the confidence of the community. I am aware that contradictory decisions have been made, and will continue to be made, until our decisions are regularly reported. The Judges cannot recollect all the questions that have been before them, and subsequent judges cannot have an intuitive knowledge of the decisions made by their predecessors. But when they come before us in an unquestionable shape, there are but few instances in which they ought not to govern.

It has been contended in the course of the argument, that this question has not been settled in the case of *Grier & Shackleford*. But I have not been able to discover any distinction, except that that case goes farther than has been contended for in this. In that case, the counsel, apprehensive that a *quo warranto* could not be supported against the officer, as long as the proceedings of the managers remained unimpeached, applied for a *mandamus* against them at the same time. The Court discharged the rule on the managers, without requiring them to shew any cause, on the ground that, as the Legislature had constituted them a tribunal to "hear and determine" the question, their decision was final and conclusive, and this Court had no control over them. That furnished the ground of dissent on my part. Not that I intended to prejudge the merits of the case ; but I thought the managers

were subject to the mandatory process of this Court, and that the rule was prematurely discharged. The decision of the Court, however, is to be respected. In this case no such inviolability is contended for on the part of the managers. The ground of defence is, that the proceedings ought to have been against the managers, and not against the incumbent; and that he cannot be ousted of his office as long as their judgment remains unreversed. If, therefore, the case of *Grier & Shackleford* decided any thing, it decided the principle involved in this case. Some ambiguity appears in that case, from the circumstance of some of the Judges having spoken of it as a *mandamus*, while others treated it as a *quo warranto*. But when it is understood that the two cases were taken up together, the mystery is explained. If we are to be governed by the case of *Grier & Shackleford*, it is unnecessary to enquire how far the judgment of an inferior tribunal like this may be inquired into in this collateral way. It is sufficient for this Court that the question has been decided. Neither is it necessary to go into an inquiry how far the regularity of an election can be tried through the medium of the person elected. I will barely refer to two cases on the subject, without expressing any opinion: *The King vs. Meir*, 3 Term Rep. 596. *Symmers and others vs. The King, Cowper*, 507. The decision of the managers then is conclusive upon all the grounds, except that which relates to the Court itself; and that question may as well be settled on this motion as in any other way. It would be an idle ceremony to grant an information, when it appears upon its face that the object wished for cannot be obtained.

The decision therefore of the Court below, must be reversed.

Justices Colcock and Huger, concurred.

Mr. Justice Bay, dissenting, delivered the following opinion:

This is a motion to rescind an order I made at Chambers, on the 8th instant, for leave to file an information in

nature of a writ of *quo warranto* ; and as a majority of the Judges have been against me on that point, I have only to say, that it becomes me respectfully to submit to the opinion of that majority. The application was to my discretion as one of the Judges of the State ; and in the exercise of it, I was governed by the best judgment I could then form upon the subject. If I had refused the application, it might have been said on one hand, that it would have amounted to a denial of right, and have been closing the door of justice against an oppressed man ; while on the other hand again, it was contended and urged, that the case was not now open for further investigation, as it had been previously determined by the Board of Managers appointed by the Legislature, whose decision, it was alleged, was final and conclusive. In this conflict of sentiment, I confess I did not choose to take upon myself alone, the responsibility of shutting out forever, all chance of further investigation ; but thought it most advisable, under all the circumstances, to make such a decision as would admit of an appeal to a full bench, before whom, (if I should have erred in opinion,) an opportunity would be afforded of correcting such error, and of fixing a principle that would govern in all similar cases in future throughout the State of South-Carolina. Whereas, if I had refused the motion, it would have been deciding alone, and taking all the responsibility upon myself ; which could not, in the nature of things, be so satisfactory to the citizens of the State as the course which has been pursued, by which means this subject has again come in review before all the Judges ; a majority of whom have put this question at rest. I was not unaware of the Georgetown case, (*Grier & Shackelford*,) but that was a new case, and although I concurred in it, I did not think it so conclusive, in cases where flagrant abuses were alleged, as to prevent the superintending power of this Court from being occasionally exercised for the correction of such abuses. It was not my intention, however, to give any opinion on the merits of the question on either side, nor did I hint at it in the remotest degree ; my only

view was, to give the parties a more full and satisfactory hearing before a jury of the country, agreeably to the rules of law. In the Georgetown case, it was determined, that a majority of the managers had a right to determine the contested election; and that it was the intention of the Legislature that a majority of the managers should finally decide. In that case, however, the whole of the managers were present when the decision was made. In the present case, a new principle has been determined, which did not arise on that question; here it has been determined, not only that the majority should decide finally, but that a majority of that majority shall be equally decisive and final as if the majority of the whole should have determined it, although the latter majority should be a minority of the whole body of managers. So that in future, if the Legislature should appoint eight managers to conduct the election in any district in the State, and five out of the eight were to attend to count the votes, and declare the persons elected, the determination of any three out of the five shall finally determine the election. This is carrying the principle much further than was ever hinted at in the Georgetown case, and is one to which I can never yield my assent, until sanctioned by the Legislature.

Mr. Justice *Gantt*, dissenting, delivered the following opinion :

I am of opinion the Judge below was correct in granting the information in nature of a *quo warranto*. That, and not the merits of the case, was the question to be tried above. I think the decision therefore, on the merits, was premature in the Court of Appeals.

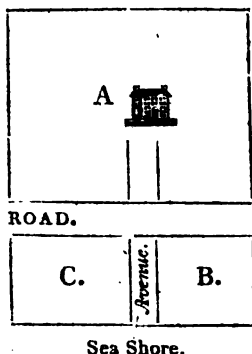


BENJAMIN WITTER vs. JOSEPH R. HARVEY.

Where two tracts of land call for a road, as the dividing line, the owners on each side hold to the middle of the road.

Where a person lays out a road through his own land, and for his own convenience, it is not a dedication of it to public use, unless it lead to a market, or other public place.

THIS was an action of trespass for cutting down a gate which the plaintiff had erected across an avenue running through his plantation. It appeared in evidence that *Isaac Rivers* formerly owned the two tracts of land on James' Island, marked on the plat hereto annexed, B. and C. then being an entire tract.



He afterwards purchased the tract A. lying on the north side of a public road which divided it from the other land. From his house on A. he laid out an avenue running south, through B. C. to the sea shore. By his last will, he devised B. to his son, *Josiah Rivers*, describing it as lying on the east side of the avenue, and bounded by it. He devised C. to *Gracia Rivers*, and describes it as lying on the west side of the avenue, and bounded in the same manner. The two tracts B. and C. after passing through several hands, have become united in the plaintiff, who, conceiving that the avenue belonged to him, erected the gate in question. The defendant, on the other hand, conceiving that he had a right to the use of the avenue, entered and cut down the gate; and for that alleged trespass, this action was brought.

The cause was tried in Charleston, Spring Term, 1819.

The presiding Judge directed the Jury, that as the testator had devised the two tracts of land B. and C. to different persons, describing one as lying on the east, and the

other on the west of the avenue, and calling for it as a boundary, the avenue itself did not pass under the will, but still remained undisposed of. And therefore although the defendant had no right of way, the plaintiff having no title to the land, had no right to obstruct the passage, nor maintain an action for removing it.

The jury, pursuant to these instructions, found a verdict for the defendant.

This was a motion for a new trial, on the ground of misdirection in the Court.

Mr. Justice *Nott* delivered the opinion of the Court.

Several views of this case have been presented to the Court in the course of the argument. But the only question which it is necessary to consider is, whether the jury were correctly instructed with regard to the law. For if they have predicated their verdict on a misconception of the law, the plaintiff is entitled to a new trial, although possibly the testimony may have authorized the same result, if the law had been correctly stated to them. We are always authorized to presume that the jury pay that respect to the opinion of the Court, on a point of law, as to be governed by it, except when the contrary appears by the verdict itself. And from the best consideration I have been able to give the subject, I am of opinion that the land passed under the will. That the plaintiff having united the two tracts B. and C. had acquired a title to the avenue, and was therefore entitled to a verdict. I take it to be a conceded principle of national law, that where two states are separated by a river, each is entitled to hold to the middle of the stream. It is laid down in *Vattel*, 110, B. 1, ch. 22, that where a river divides two nations, and neither can shew a preference, the dominion of each extends to the middle of the river. It has however been said, that this is a principle of national law only, and not applicable to cases of individuals. But I think it will appear to be equally a rule of municipal law, and that it applies as well to roads as to rivers. Lord *Hale* says, that "fresh rivers

do of common right belong to the owners of the soil adjacent ; so that the owners of the one side have of common right the property of the soil, and consequently the right of fishing *usque ad filum aquæ* : and the owners of the soil on the other side, the the right of soil and ownership, and fishing unto the *filum aquæ* on their side." (*Harg. Law. Tracts*, 5.)

In the case of the *Royal Fishery of the Banne, Dav. Rep.* 149, it was resolved, that rivers not navigable belong to the owners of the soil ; and if such river runneth between two manors, and is the mean or boundary between them, the one moiety of the river and fishery belongs to one lord, and the other moiety to the other. And this point, it is said, was resolved in this case by the rules and authorities of the common law. But, besides, it is further said in the same case that divers rules of the civil law and customary law of *France*, agreeable to our law in this point, were cited out of *Renatus Choppinus*, a very good author. It is also recognized in *Pennsylvania* as a rule of the common law ; though held, very properly, I think, not to be applicable to the large navigable rivers of that State. (*a.*) The same distinction, I have no doubt, would be made here.—The ebbing and flowing of the tide cannot give character to our rivers as it appears to do in England. In rivers which are navigable for many hundred miles above the flowing of the tide, some other criterion must be resorted to. But that does not alter the principle, where it is admitted that the stream is not navigable.

In *New-York* the same rule prevails. (*Jackson vs. Louw*, 12 *Johnson*, 255.) All these, to be sure, were rivers and not roads ; but they serve to illustrate the principle. (*b.*) The same rule must be applicable to both ; it is one founded on necessity and convenience. The laying out of a road over a man's land does not divest the owner of the soil. (*Chester vs. Alker & Elmes*, 1 *Burr.* 143. *Lade vs. Shepherd*, 2 *Str.* 1004. 1 *Will.* 107. *Harrison vs. Parker*, 6 *East*, 154. *Jackson vs. Hathaway*, 15 *Johnson*, 453.) It only operates as a suspension of the use as long

as it is required for public purposes. The reversionary interest remains unimpaired by any lapse of time. If the land become divided, and the road be made the boundary of both parts, upon a discontinuance of the road, that interstice will be reduced to a mathematical line, which must be in the middle. In the sub-divisions of land which are daily taking place in our country, we find that the most permanent boundaries, such as rivers, creeks, and roads, are usually sought for. The occupants on neither side can claim an exclusive right; because it is the boundary of both. They can not have a common interest, because there is no community of interest in the soil on each side. Policy forbids it, because it would lead to endless contention and strife. The various purposes of machinery to which a creek or river may be applied requires that each should exercise an exclusive right to the middle. In the case of *Jackson vs. Hathaway*, (15 *Johnson*, 453,) Judge *Platt*, who delivered the opinion of the Court, says, that where a stake is called for on the side of a road, and a line from thence running a certain course to another stake, and so on by specified courses and distances, it will exclude the road. But he says, "where a farm is *bounded along a high way, or upon a high way, or running to a high way*, there is reason to intend that the parties meant the middle of the high way." I think, therefore, whether we consider it upon principle or authority, we are authorized to conclude that it is a rule of national law, and of the common and civil law. That it is the law of several of the states, as far as it is applicable to their particular situations, and not altered by any act of the Legislature, I have already shewn; and I think, therefore, we must consider it to be the law of this state.

I will now enquire whether this case comes within the rule?

I have not the will before me, by which I can ascertain the precise words in which the devises are couched. I am obliged to rely, therefore, upon the impressions made at the argument and memoranda taken at the time. I can.

however, say with confidence, that there are no express words of exclusion. The testator simply devises the land on the west side of the road to one son, and that on the other side to another son, and calls for the road as the boundary of each. There is nothing therefore in this case to make it an exception to the general rule. It is worthy of remark also, that A. and B. were both devised to *Josiah Rivers*. He sold to *Benjamin Harvey*, the uncle of the defendant, the tract B. "*with one half of the avenue.*" *Benjamin Harvey* sold the same to *Alexander Chisolm*.—*Gracia Rivers*, to whom C. was devised, sold to *Jonah Rivers*, and described it as bounding on *Alexander Chisolm's* land. So that both the devisees, (and one of them the devisee of the tract A.) considered themselves as holding to the middle of the avenue. In addition therefore to the law, and to the policy and convenience of the rule, we have the opinions of all the parties then interested in the question.

It is however contended that laying off the avenue, and leaving it open for any who choose to travel that way, was a dedication of it to the public, and that it thereby became a public high way.

But to lay off a road through ones own plantation, and for his own convenience, cannot be construed into a dedication of it to public use.

If it had become a public market road, or even if he had permitted a church or other public building to be built at the end of the avenue, it might have admitted of that construction. But the only purpose for which this road was ever used was that of fishing and cutting the marsh grass. It is true, that through politeness and courtesy he permitted his neighbours to participate in those enjoyments. But a mere courtesy can never grow into a right. Indeed it does not appear that any person claims the right, except the defendant.

To constitute a high way, it must at least be of public utility, if not of necessity. But this was incapable of becoming a public road. Its use was necessarily limited to

a few neighbours, and that for the purposes of convenience more than necessity. It is also contended that the defendant is entitled to the use of this road as appurtenant to his house. But he certainly cannot claim the land itself as an appurtenance. One separate and distinct piece of land cannot be an appurtenance to another. Besides, the deviser has not given any appurtenances with his land; and even if he had, the use of this road could not have been one. It is not every thing that is convenient to a man's plantation that can be considered as appurtenant to it. The testator owned all the lands in question. And when he owned the whole, it was convenient for him to have this road or avenue open. But it did not become appurtenant to it, because his mansion house happened to be there. It was equally convenient for the enjoyment of all his lands, and as much so to B. and C. and perhaps more than to A. And the mere reservation of a privilege for himself could not be a dedication to the use of another. Neither can we suppose that he intended to allow a privilege to one of his children, which would be an incumbrance to another, and particularly, without an express declaration to that effect. It is not however necessary to dwell upon this point. For if the defendant has any exclusive or common right, he will have an opportunity of shewing it on another trial.

I am of opinion a new trial ought to be granted on the ground of misdirection.

Justices *Johnson* and *Huger*, concurred.

Justice *Colcock*, dissented.

(a.) *Carson vs. Blazer*, 2 *Binney*, 476.

(b.) See *Law Register*, by Judge *Griffith*, article Connecticut, page 76. Or 2 *Conn. Rep.* 480. R.

MARY SAMPSON vs. WHITE, Adm't of BRADLEY.

Where the witnesses to a will are dead, their hand writings may be proved to establish the will.

THIS was an appeal from the ordinary, tried October Term, 1820.

It appeared by the report of the ordinary, that letters of administration had been granted to *John White*, on the estate of *Henry Bradley*, on the 27th day of September, 1819. On the 10th of November following, a paper, purporting to be the last will and testament of *Henry Bradley*, was offered for probate. That paper, to use the words of the ordinary, "was proved in the usual form by *Jonathan Wright*, one of the subscribing witnesses." The ordinary declined however to admit the will to probate until the letters of administration were revoked. A rule for that purpose was then issued against the administrator; he came forward and required the will to be proved in solemn form; but before that question could be heard, *Jonathan Wright*, one of the subscribing witnesses, died.—*John Locklier*, the other subscribing witness, was a coloured man, and therefore his testimony was rejected. *William Villepontoux* was then called; he was not a subscribing witness, but "he swore that he wrote the will at the request of the deceased; read it to him distinctly; he said it was his will; he could not write himself, and requested witness to put his name to it: And *Jonathan Wright* and *John Locklier* put their names to it as witnesses. All the parties were together, and the business was all done at one time. He also proved the sanity of the testator, &c.

The ordinary, in giving his opinion, among other things, says, "this will has received proof in the common form by the testimony of *Jonathan Wright*, one of the subscribing witnesses to the same." Again, he says, "*Jonathan Wright* is since dead, and his hand writing can only be proved; the party objecting, never having had an opportunity of examining him." He then concludes, "the will

must therefore be dismissed, as by the authority from *1 Roberts on Wills*, 171, where it is laid down, that when a will is to be established by the probaton of solemn kind above alluded to, the civil law rule of establishing all proof upon the testimony of two witnesses, is followed in our ecclesiastical Court. *John Locklier's* testimony being in the opinion of the ordinary inadmissible, and the *Whites* having had no opportunity to examine *Jonathan Wright*, the testament not being in the hand writing of the testator, nor signed by him, ought not, under the circumstances to be sustained."

An appeal was made from this decree of the ordinary, to the circuit court; and the presiding Judge in the Court below confirmed the decree.

This was a motion to reverse that decision, on the ground that the decree of the ordinary, as also the decision of the Judge in the Court below, were contrary to law and evidence.

Mr. Justice *Nott* delivered the opinion of the Court,

The ordinary lays down as the basis of his decision in this case, that the civil law rule which requires the attestation of two witnesses to establish a will of personal estate ought to prevail in his Court. He then seems to think that proof of the hand writing of *Jonathan Wright* would not be a fulfilment of that requisite of the law; because it afforded the opposite party no opportunity of a cross-examination; and that the probate of the will, in common form, ought to be of no avail for the same reason.

Whether it has ever been decided in this State, that the civil law rule, with regard to the admission of testaments to probate, ought or ought not to be adopted in our Courts of Ordinary, I do not know. Neither do I know what rule the ordinaries themselves have observed in that respect; and it is not necessary to decide the question in this case. The rule which requires two witnesses, requires nothing more than that their attestation should be established in the same manner as that of one witness, where one

only is required at common law. Thus for instance, the obligor of a bond is entitled to the cross-examination of the subscribing witness. Yet, if he be dead, proof of his hand-writing is sufficient. So on an issue of *devisavit vel non*, if one, or even all the subscribing witnesses were dead, proof of their hand writing would be sufficient. It would operate much more injuriously that one party should be deprived of the positive testimony of a witness, than that the other should lose the benefit of a cross-examination. If, therefore, *Jonathan Wright* had never been sworn before the ordinary, proof of his hand writing, with the testimony of *Villepontoux*, would fully have satisfied the law. But it is contended that the hand writing of *Wright* ought to have been proved by two witnesses; let that be admitted in cases where proof of the hand-writing alone is relied on, still this is a stronger case. Here, *Wright* himself had sworn to his own hand writing, and to the execution of the will by the intestate. The ordinary then had still higher evidence than proof of the hand writing would afford. He had the positive oath of the witness, instead of proof of his hand-writing. The ordinary undoubtedly had a right to reject the testimony of *Locklier* upon inspection. Colour is in many cases an uncertain test; but it is sufficient to authorize the Court to throw the burthen of the proof upon the other side.

The new trial must be granted.

Justices *Colcock*, *Gantt*, and *Huger*, concurred.



E. S. THOMAS vs. DYOTT, Adm'r of BEST.

Where an administrator neglects to plead *plene administravit*, and the Sheriff returns *nulla bona* on a *fi. fa.* issued on a judgment against him, such judgment and execution, with the return of the Sheriff, is sufficient to charge him in an action on the judgment suggesting a *devastavit*.

It is sufficient to shew that the parties all lived in the city of Charleston, and that the proceedings were carried on there, to give jurisdiction to the City Court, without proving that the waste was committed there.

TRIED before the City Court of Charleston, September Term, 1820.

Debt on judgment, suggesting a *devastavit*.

The following is the report of the Recorder :

In this case a judgment by default had been obtained against the defendant as administrator of Best. The plaintiff therefore brought an action of debt upon the judgment, suggesting a *devastavit*, in order to render the defendant individually responsible. He produced the record of the former judgment, which was in assumpsit. To the declaration, the plea of the general issue had been filed. A *feri facias*, in the usual form, had been issued, and the sheriff made a return of *nulla bona*. The judgment was obtained in Charleston, and the parties, both plaintiff and defendant, resided within the city.

The plea was, not guilty.

The plaintiff's counsel contended, that the production of the original judgment, and of the sheriff's return of *nulla bona* were *prima facie*, and, unless rebutted by the defendant, were conclusive evidence that a *devastavit* had been committed by the defendant as administrator, and therefore that the plaintiff was entitled to a verdict. He cited *Peake's Evidence*, 351, and *Platt vs. Robins & Swartwout*, 1 *Johnson's Ca.* 276.

The defendant's counsel insisted that this action could not be sustained :

1st. Because no *devastavit* had been proved ; as there was a difference where the sheriff had returned *nulla bona*, and where he had returned *devastavit*. That, in the authorities relied upon by the plaintiff, a different issue from the present one was presented to the Court, viz : that which arose under the plea of "*nil debet* ;" whereas, in the case before the Court, the plea was " not guilty." He referred to Lord *Kenyon's* opinion in the case of *Erving vs. Peters*, 3 *Term Rep.* 687-8.

2d. Because this Court had no jurisdiction ; the sheriff of Charleston district not having returned that a *devastavit*

had been committed in the city of Charleston ; but having merely made a general return of *nulla bona*. I thought the production of the original judgment, from whence it appeared that the defendant had pleaded the general issue, without interposing a plea of *plene administravit*, or any plea of that nature, accompanied with the sheriff's return of *nulla bona* to the writ of *feri facias*, were conclusive in this case to render the defendant individually liable. That it was immaterial whether the plea of "*nil debet*" or of "not guilty" had been relied upon ; as in substance both pleas were the same. That under the one, the defendant was not guilty, because he had not wasted the goods of the deceased ; and under the other plea, he did not owe any thing, because he had not committed the same act. That in England, the present practice was for the sheriff to return *nulla bona* to the *feri facias* ; upon which the plaintiff brings an action of debt, suggesting a *devastavit*.—(*Tidd's Practice*, 1018.) And to manifest the want of distinction between the returns of *nulla bona* and of *devastavit*, the sheriff, at his option, may return either *nulla bona* or *nulla bona* and a *devastavit*. (*Tidd's Pr.* 1019.) I said that the decisions making executors or administrators liable under the existing circumstances were numerous, and they seemed to me to be founded both in reason and in principle. That it would be vexatious to multiply suits unnecessarily. If the executor had no assets, he ought to set forth that fact as a plea ; and if he did not do so, and was allowed afterwards to plead it to another action, two suits, without any semblance of utility, would be substituted for one ; not only to the injury of the creditor, but to the subversion of the general legal and equitable principle, that if a defendant do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards do so, either in another suit founded upon it, or to a *scire facias*.

Upon the second ground, I decided against the defendant, because the judgment was entered up in the city of Charleston, within which, both the plaintiff and the defendant resided.

A notice was served upon me that a new trial would be moved for, upon the grounds which are included.

WM. DRAYTON, *Recorder.*

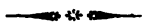
Mr. Justice *Nott* delivered the opinion of the Court.

It would perhaps be sufficient to say, that the Court is satisfied with the verdict in this case, for the reasons given in the report of the Recorder. I will, nevertheless, add that the failure of an administrator to plead *plene administravit*, is an admission of assets in his hands sufficient to pay the debt. Whenever therefore a *fi. fa.* in such case is issued against the goods of his intestate, it is his duty to pay the debt, or to point out the property of which the money is to be made. If no property is to be found, on which the execution can be levied, it furnishes *prima facie* evidence that the goods have been wasted. I say *prima facie*, because, if the goods should be destroyed by the act of God, or taken out of the possession of the administrator by any means not within his control, perhaps he might be permitted to rebut that evidence by the proof of such fact. But on that point I give no opinion, as no such proof was offered in this case. It operates no hardship or injustice upon the defendant. If he have assets, he ought to pay the money; if he have not, he must plead it. His situation is precisely the same as every other defendant who fails or neglects to protect himself by a proper plea. It is no answer to say that the *scire facias*, or an action suggesting a *devastavit* is idle, if the first judgment is conclusive against the defendant. The same may be said of a *scire facias* to revive a judgment or against bail. The judgments in those cases are both conclusive against the defendant up to the time at which they were obtained. The object of this proceeding, is not to afford the defendant an opportunity to re-try the original action, but to shew whether there is any radical defect apparent on the face of the record which renders it void; or whether any thing has occurred since to relieve him from the ultimate responsibility which had attached upon him by such judgment.

The question of jurisdiction is not more difficult. A *devastavit* does not usually result from a single act; it depends upon the whole course of administration. It is personal in its nature, and perhaps is incapable of distinct location. I will not undertake to say how the question might have been viewed, if the administrator had been in one place, the judgment in another, and the residence of the defendant in a third. But as they all happened in Charleston, it cannot be made a question where the *devastavit* happened.

The motion therefore must be refused.

Justices *Colcock*, *Richardson* and *Huger*, concurred.



BROWN, GREEN & CO. vs. ISAAC MINIS.

Quere.—If a Corporation of another State can maintain an action in this state, in its corporate name?

A. recovered a judgment against B. and assigned it to the Bank of Georgia for valuable consideration. Afterwards C. a creditor of A. sued out a writ of attachment against A. and a copy of the writ was served upon B. as garnishee. The Bank filed a suggestion, stating its claim; to which C. demurred, on the ground that the Corporation was a creature of another State, and could not prosecute a suit in this. *Held*, that the suggestion of the Bank substantially alleged, and the demurrer consequently admitted that the Bank had a corporate existence, and that the judgment had been assigned for valuable consideration; which assignment operated so as to divest the absent debtor of all property in the judgment, and it was not therefore subject to the attachment.

TRIED at Coosawhatchie, April Term, 1820.

The defendant and his co-partner, *Jacob P. Henry*, trading under the firm of *Minis & Henry*, of Savannah, recovered a judgment in the Court of Common Pleas, for Beaufort district, against *Saul Solomons & Co.* for \$9000; and afterwards, for a valuable consideration, assigned that judgment to the Bank of the State of Georgia. In 1819, the plaintiffs, who were creditors of the defendant, *Isaac Minis*, sued out a writ of attachment against his effects, re-

turnable to the Court of Common Pleas, for Beaufort district, which was served on *Saul Solomons & Co.* as garnishees. In their return to this writ, *Saul Solomons & Co.* admitted themselves indebted to *Minis & Henry*, to the amount of the judgment against them. At this stage of the proceedings, the Bank of the State of Georgia, in its corporate name, interposed her claim to this judgment, and filed a suggestion in pursuance of the attachment act, setting forth the assignment of the judgment to her by the said *Minis & Henry*, thereby putting in issue the right of property in the said judgment.

To this suggestion, the plaintiffs demurred, and assigned for cause, that the Bank of the State of Georgia being the creature of another State, and unknown to the laws of this State, could not maintain an action here in its corporate name.

The presiding Judge gave judgment for the plaintiffs in demurrer, and a motion was made, on the part of the Bank of the State of Georgia, to reverse that judgment.

Mr. Justice *Johnson* delivered the opinion of the Court.

Most of the grounds of the present motion have been directed to the question made by the cause of demurrer set forth by the plaintiffs, and present the enquiry, whether a foreign corporation can maintain an action here in its corporate name? And to this point, the arguments have been principally directed; but the Court have not thought proper to express an opinion on it, as it is wholly unnecessary to the decision of the present case. (*a.*) The suggestion on the part of the Bank in its corporate name, substantially alleges, and the demurrer consequently admits that the Bank had a corporate existence, and that the judgment against *Saul Solomons & Co.* had been assigned to it for a valuable consideration.

The question then is not, whether the Bank can maintain an action or not in its corporate name, but whether the property in the judgment still remained in *Minis & Henry*; for, in that event alone, could it be the subject of

condemnation at the suit of an attaching creditor? The facts furnish the answer; they were divested by the assignment. Notwithstanding therefore the issue joined between the attaching creditor, and the party claiming the thing attached, does, in some measure, partake of the properties of an action, the only question is, whether the thing attached is the property of the absent debtor, and whether the party claiming, does or does not labor under a disability to sue? If they are entitled to hold the thing attached, it is surely a sufficient reason why it should not be condemned as the property of the absent debtor.

The motion is, therefore, granted.

Justices *Bay, Nott, Gantt* and *Richardson*, concurred.

Petigru, for the motion.

King, contra.

(a.) See *Bacon, Corporation* E. 2. 2 *Lord Ray*. 1532. 1 *Str.* 613.

JAMES MCCALL vs. ANN PRICE.

All the parties to a joint contract must be sued; and although the sheriff returned *non inventus*, as to one, and that he had left the state, and the declaration stated the facts, yet a plea in abatement for the *non joinder* was supported.

TRIED before his honor Judge *Colcock*, Charleston, May Term, 1820.

This was an action of debt, on a joint bond of one *Thomas Nichols*, and defendant. An appearance was entered for defendant; but as to *Thomas Nichols*, the sheriff returned that he was absent from the State, and could not be found. The plaintiff declared against the defendant, stating, in his declaration, that the said co-defendant or obligor, *Thomas Nichols*, was absent and could not be served with process. To this, defendant pleaded in abatement, that *Nichols* was joined as an obligor with her, and that he was alive, &c.

In reply, the plaintiff alleged that said *Nichols* was absent from the State, and could not be served with process.

To this replication, defendant demurred.

This demurrer and plea in abatement, was overruled by his honor, after argument, on the grounds, that as the process of outlawry was not known to our laws, and there ought to be a remedy, he thought that the lodging of a writ against *Nichols*, the co-obligor, being the first step towards making him appear, was, on the return of the sheriff that he was absent from the state, sufficient to enable the plaintiff to declare against the obligor who was served.

From this decision, the plaintiff appealed to the Constitutional Court upon the following grounds :

1st. Because, when the parties are jointly and not severally bound, as they are here, the obligee must sue them jointly.

2d. Because, if the process of outlawry be known to our laws, it should have been sued out against the co-obligor, *Thomas Nichols*, before the defendant, *Mrs. Price*, could be legally charged with the whole debt.

3d. Because, if such outlawry process be unknown to our laws, there is no remedy at law for the plaintiff, and the Judges cannot make one.

Mr. Justice *Colcock* delivered the opinion of the Court.

The common law doctrine, that where there are two joint obligors, both must be sued, is too familiar to admit of doubt ; also, that it has been decided in England, that where one of two joint obligors is out of the kingdom, the plaintiff must proceed to outlawry against him. (*Shepard vs. Baillie*, 6 Term. Rep. 327.) But I am of opinion that the process of outlawry is obsolete, and contrary to the spirit and principles of our government. It would be inconvenient in practice, if not utterly impracticable, without some legislative provision ; and therefore there is no remedy, unless the plaintiff be allowed to proceed in the manner in which he has proceeded. I take it that it is incumbent on us to pursue the common law, only so far as the same is consistent with the principles and spirit of our government, and that in this instance I have done so. By the common law of England, it is established, that where

there are two joint obligors, both must be sued. By the same law, a remedy is given, where one is without the kingdom. Shall it be said we are to adopt the first provision of the law, when the other cannot be applied? I am ready to say we are not bound to do so. Again, if the process of outlawry in such a case as the present were resorted to in England, what would result? That it would appear that one of the joint obligors was absent from the kingdom, and without the control of the law. The plaintiff could then compel the other defendant to pay the debt. Now does not the same thing appear to us? The one who was compelled to pay the debt, would not be benefited; for if there are no goods to be forfeited, nothing could be obtained for him by the outlawry.

But it is said we cannot know, nor can the fact be put on the record, that the absent debtor has no goods. The answer is plain, if he have any, let the co-obligor find them; for it may be reasonably supposed that he is best acquainted with the circumstances of the absent person. If a remedy did not exist in England by process of outlawry against the absent joint obligor, I have no doubt that it would be held, that a voluntary abjuration of the realm was a destruction of that unity of responsibility which renders it necessary that both should be sued; and this I think is supported by the analogies of the law. "A husband who hath abjured the realm, or is banished, is thereby *civiliter mortuus*; and being disabled to sue, or be sued, in right of his wife, she must be considered as a feme sole." And what is the reason assigned? For it would be unreasonable that she should be remediless on her part, and equally hard upon those who had any demand on her, that not being able to have any redress from the husband, they should not have any against her. (1 Bacon, Title Baron & Feme, letter M.) Now, I cannot conceive that the unity of interest and person, between two joint obligors, can be greater than that which the law recognizes between husband and wife; and if the voluntary absence of one of the parties in the one case is considered as a dissolution of the legal uni-

ry, I can not conceive why it should not be so in the other. But a majority of my brethren are of opinion that the plaintiff can not recover; that both the co-obligors, in a joint contract, must be sued, and that however hard, that there is no remedy which this Court can apply.

The motion is granted.

Justices *Nott*, *Johnson* and *Huger*, concurred in granting the motion.

Justice *Gantt*, I concur in the opinion expressed by my brother *Colcock*.

Pringle and *Pinckney*, for the motion.

Kennedy, contra.

JOHN STONEY, Assignee, vs. JOHN P. McNEILE.

Where a party demurs for informality, the Court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective.

No man can make an averment against his own deed; and where the defendant gives a bond to A. he cannot plead that the bond was given to A. for the benefit of a co-partnership, of which A. was a member.

TRIED before Mr. Justice *Huger*.

This was an action of debt, on bond, given by the defendant and two others to one *Alexander Henry*. It was joint and several; the defendant alone was sued. The bond was assigned by *Henry* to *John Stoney*, the plaintiff. On the bond there was a guarantee by *Joshua Brown*, and also, a receipt by the said *Brown* to the defendant, for \$8515; in consideration of which, he said he exonerated the defendant from any further responsibility to this action.

Defendant pleaded seven pleas:

- 1st. The denial of the bond.
- 2d. After craving oyer, he pleaded payment to *A. Henry*.
- 3d. That *Alexander Henry* and *Joshua Brown* were co-partners in trade, and that he paid the money to *Brown*, and he discharged him from further responsibility.
- 4th. That *Henry* and *Brown* were co-partners, and that

the bond was made payable to *Henry*, as one of the firm, to and for the benefit of the concern, and alleged the payment and discharge as before.

5th. This, in substance, charged the same things, but in different form of words.

The 6th, stated the co-partnership, and that the bond was made payable to *Henry* for the benefit of it, and alleged, that he contested the validity of the bond, and that therefore the payment was made, and received as a full discharge.

The 7th, stated that the consideration of the bond was a corrupt agreement to sell goods for the accommodation of defendant, and the other two, *William* and *John Walton*, at a price beyond their value, to elude the statute against usury ; and that in fact more than seven per cent. was obtained by this contract, or secured to be paid.

To these pleas, the plaintiff replied :

On the first and second, he tendered an issue.

To the third, he replied that he ought not to be barred of his action ; because the bond was not made payable to the firm of *Brown & Co.* and without that, that the said *Brown* was not authorized to receive the money, and give a discharge.

And to the fourth, fifth, and sixth, he replied in substance the same ; that the bond was not given to *Henry* as one of a firm, or for the benefit of a firm ; and denying the authority of *Brown* to receive and discharge, without either confessing or denying that any co-partnership existed between them.

To the seventh, he tendered an issue.

To the third, fourth, fifth and sixth replications, the defendant demurred specially, and for cause, that the replications profess to answer all the matter contained in the pleas, and yet does not confess or deny that *Brown & Henry* were co-partners, and that they put in issue the authority of *Brown* to receive, and at the same time deny that he did receive ; and that generally the replications con-

clude to the country, whereas they should conclude with a verification.

To this demurrer, there was a joinder by plaintiff.

Mr. Justice *Colcock* delivered the opinion of the Court.

A party should not demur unless he be certain that his own previous pleading is substantially correct; for it is an established rule, that upon the argument of the demurrer, the Court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance. (*1 Chitty, 647.*) In the application of this rule to the case before us, it is unnecessary to notice the defects of the replications; for upon looking into the defendants pleas, he has, in the first place made an averment against his own bond, not consistent with the rules of pleading. If the bond had been given to *Henry* for the benefit of a concern, he should have so written it; it was his deed, and no man can make such an averment against his own deed.

2d. The pleas in effect are no more than the plea of payment; for under that, it was competent to shew that *Brown* did receive, and his authority, if he had any.

And 3d. He plead matter not cognizable in this Court. (*The U. S. vs. Arthur, 5 Cranch, 257.*)

The motion is discharged.

Justices *Nott, Johnson, Huger* and *Gantt*, concurred.



Ex Parte, Ex'ors of GEORGE STEPHENS, Ex'or of JOHN R. STEPHENS.

The testator bequeathed all of his negroes to be divided equally among his grand children, share and share alike, among such as should be living at the time of such division, and not otherwise; and that the division should take place so soon as the debts be paid. A sale was made by the executor to enable each legatee to purchase in the amount of his share, and the husband of one of the legatees purchased two negroes, and gave the executor a bond and mortgage for the same, endorsed, "given as security in case of any demands or suits coming against the estate, or till a final settlement take place." After

this, a bill was filed, and a partial decree made for partition; but yet no division made; and then the wife of the purchaser died. *Held*, that by the sale, the debts were to be presumed paid, and that the legacy, by this sale, was placed by assent of the executor in possession of the husband, and that he could not revoke it, or recall the property, on the ground that no division had been made.

On a rule against the sheriff, to pay money over to a mortgage in preference to an execution or attachment, which mortgage, though not recorded, plaintiff's counsel contended took priority to judgments, executions, &c. The Court refused to decide the question of priority on a motion, as it involved facts which could alone be tried by a jury.

THIS was a rule against the sheriff, heard before Mr. Justice *Gantt*, at November Term, 1820, for Beaufort district.

George Stevens, by will, bequeathed as follows:

"It is also my will and desire, that the whole of my negroes be divided equally among the male and female children generally, of *Martha Givens*; the children of *Joseph Oswald*, generally; the children of *William Oswald*, of St. Helena, by name, *Benjamin* and *Robert Oswald*; together with my other child or children, which *Martha Givens*, wife of *Charles Givens*, might have previous to such division; all share and share alike, among such as shall be living at the time of such division, and not otherwise; and that the division shall take place as soon as the debts are paid."

Charlotte Oswald, one of the children of *Joseph Oswald*, married *Bethel Dewes*. A sale of the negroes was made by the executors on the 16th April, 1817, for the purpose of enabling each legatee to purchase in the amount of his share. *Bethel Dewes*, by the assent of the executors, bought, in right of his wife, two negroes, *Jim*, and *Elsey*, and gave a bond and mortgage of the same to the executors. The mortgage had not been recorded. Upon the bond and mortgage, was the following memorandum.—
"Given as security, in case of any demands or suits coming against the estate, or till a final settlement take place."
It was admitted, that not long after the sale, a suit in equi-

ty was brought by *Sherwood Beekun* and wife, claiming as legatee of *John R. Stephens*, in which a partial decree had been made, and a further reference ordered on part of the complainants' claim ; that no division had yet taken place, and *Mrs. Dewes* was since dead.

On the 20th March, 1819, an attachment was lodged in the office of the sheriff of Beaufort district, in which *David Turner* was plaintiff, and the said *Bethel Dewes*, defendant. *Dewes* had hired the negro *Jim* to ——— *Burke*, in whose hands, as garnishee, the said slave was attached, *Bethel Dewes*, living, then absent from the State.

On the — day of April, 1819, two judgments were entered up in the office of the Court of Common Pleas, for Beaufort district, by *Dr. Philer* and *Myer Jacobs*, against the said *Bethel Dewes* ; upon which an execution issued, and being lodged in the sheriff's office on the 7th August, 1820, levy was made on the negro *Jim*.

On hearing of these proceedings, the executors gave notice of the mortgage to the sheriff, who thereupon sold, under the execution and mortgage, and had the money in hand, subject to the claims of the mortgage, execution and attachment creditors. The rule was as follows :

“ *Ex Parte*, Ex'ors of *GEORGE STEPHENS*. ”

“ On motion of *McCall*, *Hayne*, and *Grimke*, for the executors of *George Stephens*, it is ordered, that the sheriff of Beaufort district do shew cause *instantly*, why he should not pay over to them the amount of sales of a negro fellow named *Jim*, mortgaged to them by *Bethel Dewes*, and sold by said sheriff under said mortgage, and under an execution of *Myer Jacobs* against the said *Bethel Dewes*. ”

On hearing argument in this case, the rule was discharged.

A motion was now made to reverse the said decision upon the following grounds :

1st. Because, under the will of *George Stephens*, no legatee could claim a share of the negroes, if he or she should happen to die before a division was made ; and therefore, the money coming in lieu of the negroes belonged to the

estate, and should be paid to the executors.

2d. Because, if the sale be regarded as a division, as between the executors and legatees, the executors are then entitled to the money, notwithstanding the mortgage was not recorded; inasmuch as it does not lose its priority over judgments, executions and attachments by that omission.

Mr. Justice *Gantt* delivered the opinion of the Court.

I think no doubt can exist but that the sale, on the part of the executors, was made for the express purpose of enabling the legatees to purchase to the amount of their legacies. The testator, *George Stephens*, had, by his will, directed that so soon as the debts were paid, a division should take place. By the sale, therefore, it is to be presumed the debts had been paid. *Dewes*, in right of his wife, was, by this sale, placed in possession of the legacy bequeathed to his wife, and this by the assent of the executors, who could not afterwards revoke it, or re-call the property on the ground of no division having been made. But it is said,

2ndly. That although the sale be regarded as a division, still the executors are entitled to the money under the mortgage.

Whether they were entitled to priority of claim or not, in this instance, was a question which the presiding Judge did not feel himself warranted on the hearing of this motion to decide; and the Court think that the question was one, both as regarded the law and facts of the case, not to be decided in this short hand way, by motion. It was certainly not competent for the presiding Judge to determine upon the rights of the mortgagee in this case. There were facts involved, which could alone be decided by a jury. *Dewes* and one of the execution creditors were not represented upon the occasion. Whether the mortgage did really exist under the circumstances of the case, was a fact which the Court could not decide. *Dewes* became involved after he had acquired the possession of this property,

and most probably upon the strength of it. The right too, on the part of the executors of *George Stephens*, to claim the proceeds of the sale, on account of a decree against the estate of *John R. Stephens*, with respect to whose estate, no evidence went to shew that a *devastavit* had been committed, or that it was not fully adequate in the hands of the executors for all the purposes to which it could be made liable. These views furnish sufficient evidence to conclude, that the presiding Judge, in discharging the rule and leaving the parties to their more appropriate and legal remedies, pursued the only correct and proper course. In this way, the rights of none will be compromised.

The Court are unanimously of the opinion that the appellants can take nothing by their motion.

Justices *Colcock*, *Richardson* and *Huger*, concurred.



JOSEPH MANIGAULT vs. BARTHOLOMEW CARROLL.

Upon a covenant for the lease of a lot, whereon lessee covenanted to build, which buildings, at the expiration of the lease were to be valued by indifferent persons, and at which valuation the lessor was to take the buildings, *he paying for the same* in one, two, and three years from the expiration of the time; the Court *Held*, that the payment for the houses, was not a covenant *precedent* to the delivery of them.

THIS was an action of covenant to recover certain rent and damages, for having detained the premises after the expiration of the lease, and was tried before his honor Judge *Huger*, Charleston, July, 1820.

The plaintiff, by indenture between him and the defendant, entered into on the 3d of November, 1796, leased to the defendant four lots of land in Boundary-street, for the term of ten years, at £15 per annum, payable quarterly.

In this lease, (among others,) there are the two following covenants; "and the said *Joseph Manigault*, for himself, his executors, administrators and assigns, doth covenant and agree to and with the said *Bartholomew Carroll*, his executors, administrators, or assigns, that he, the said

Bartholomew Carroll, his executors, administrators or assigns, shall and will, at their own proper costs and charges in all things, make, erect, set up, and finish, one or more substantial buildings of timber, brick, clay, mortar or stone, upon each of the three lots, number 49, 50, and 51, hereinbefore mentioned to be demised; and it is covenanted and agreed upon by the parties to these presents, that at the expiration of the said term, the building or buildings that may have been erected, and are then remaining on the said lots of land, shall be valued by two indifferent persons, one chosen by the said *Joseph Manigault*, his executors, administrators or assigns, and the other by *Bartholomew Carroll*, his executors, administrators or assigns; and in case those persons chosen cannot agree in fixing the value of the building or buildings, then a third person shall be chosen by these two persons, who shall fix the value of the building or buildings, which shall be taken by the said *Joseph Manigault*, his executors, administrators or assigns, *he or they paying for the same* in one, two, or three years from the expiration of the term. And lastly, that the said *Bartholomew Carroll*, his executors, administrators or assigns, shall and will, at the expiration of the said term, deliver and give the said *Joseph Manigault*, his executors, administrators or assigns, peaceable and quiet possession of the said four lots of land and premises."

The defendant pleaded,

1st. That there was no rent in arrear. On which, issue was taken; and,

2ndly. In substance, that the plaintiff had not fulfilled the first mentioned covenant, which he insisted was a condition *precedent* to delivering up the lots; and averred performance of all his, the defendant's, covenants and engagements.

To this plea the plaintiff, after protesting that he, the plaintiff, had performed all his covenants, but that the defendant had failed on his part, demurred, and the defendant joined in demurrer.

The demurrer was sustained.

And the defendant now appealed from that decision, on the ground, that the said condition in the lease as set forth in the plea was in fact a condition *precedent*, and that therefore the same was a good and sufficient plea in bar to the action of the lessor.

Mr. Justice *Gantt* delivered the opinion of the Court.

This case presents but one single point for the consideration of the Court, *i. e.* the nature of the covenants before recited.

Are the conditions which the defendant is obliged to perform, dependant upon some act which must previously be fulfilled on the part of the plaintiff?

Lord *Mansfield*, in the case of *Jones vs. Barkley*, (*see Douglas*, 690, 691,) says, "the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time, in which the intent of the transaction requires their performance."

What is then the evident sense and intention of the parties to this agreement? Obviously this; that the defendant should restore the possession of the premises to the plaintiff immediately on the expiration of the lease; and that his doing so, was not to depend upon a previous act to be performed by the plaintiff. The valuation of the lots was not to take place till the lease expired. The act of fixing a value upon the houses in the mode and manner pointed out in the agreement, would necessarily require time to be effected; for in case of disagreement on the part of those who were to be mutually chosen by the parties concerned in interest, a third person was to be appointed to fix the value. Is it possible to conceive that the contracting parties had it in contemplation, from any thing to be collected from the covenants, that this adjustment of value was to be made at the precise point of time that the defendant had bound himself to surrender up the possession of the premises to the plaintiff? The design of fixing a value upon the

houses would have answered the views of the parties as well if done in a few days or few weeks after the surrender, as at the time of it ; seeing that the defendant was to be paid this value by instalments, and that the first payment was not to be made sooner than a year from the expiration of the lease. It would therefore be doing violence to every rule of construction, to say that the fixing a value upon the buildings is to be considered in the light of a condition precedent to the plaintiff's getting possession of the lots. Fixing the value upon the houses was not an act which the plaintiff was authorized to have done alone ; the defendant himself was as much to be concerned in it as the plaintiff ; either or both might have been in default ; but neither was bound by the contract to perform his part of it, till after the period fixed on for delivering back the possession to the plaintiff. Besides, the consideration which the defendant was to receive for a performance of the stipulations imposed upon him, was not the ascertainment of the value of the houses, but the payment of that value in one, two, and three years ; and he had provided for himself an adequate remedy in the plaintiff's covenant for the attainment of both objects. On this we must suppose the defendant placed his reliance for indemnity. This was the construction which the presiding Judge put upon the agreement in his decision of the question upon the demurrer, and the Court are satisfied that the view taken by him was strictly correct and legal. The motion in this case must, therefore, fail.

Justices *Colcock*, *Nott* and *Huger*, concurred.

GEORGE W. PRESCOTT vs. SEARS HUBBELL.

Where the defendant, who was a sea captain, bought goods, and was to have given his note with A. as security for the same, but went to sea without giving his note, and the agent of the vendor received the note of A. alone, " which, when paid, was to be in satisfaction of the defendant's debt," the Court *Held*, that it was not a discharge of the defendant.

Where several witnesses swore that it was a custom when the vendor of goods received a note of the consignee without the endorsement of the purchaser, that the purchaser became discharged, and the maker of the note only liable; the Court *Held*, that it was a custom so unreasonable, that it could never supercede the law to the contrary.

THIS was an action of assumpsit, for goods sold and delivered.

The sale and delivery to the defendant were proved.— He was to have given his own note, endorsed by *Bours & Bascome*, in payment. When, however, the agent of plaintiff called for this note, he found that defendant had sailed. *Bours & Bascome* then offered their note, which was accepted by the agent. The plaintiff had not been consulted. For this note, the agent gave a receipt, in which he stated that when the note was paid, it was to be in satisfaction of the debt due by defendant.

The defendant was captain of a vessel, and *Bours & Bascome* were his consignees. He went to sea shortly after the purchase of the goods. The note taken by the agent of the plaintiff was put into bank for collection, dishonored and remained unpaid.

The defendant relied upon an existing usage to exempt him from personal responsibility. He contended that where the vendor of goods received a note of the consignee, without the endorsement of the purchaser, the purchaser became discharged, and the maker of the note only liable.

That there did exist an usage of this sort, was made to appear by several witnesses.

The case was tried before Mr. Justice *Richardson*,— Term, 182—, for Charleston district, who charged in favor of the plaintiff's right of recovery; and the jury found accordingly.

This was a motion for a new trial:

1st. Because the charge of his honor was incorrect in the following particulars:

1st. That if it was not the original contract of the plaintiff

to take notes of *Bours & Bascome* in payment of the goods; that the defendant was not discharged.

2d. That where one contracts a debt, he is not discharged by giving the note of another.

3d. That the usage proved by many respectable merchants, viz : That when goods are purchased, or dealings had with captains of vessels, and the notes of their consignees are taken without their endorsement, the makers of the notes are only regarded as liable, and the persons originally liable are discharged, was only in relation to a case in which the original agreement was, that the notes should be received in payment.

4th. That the plaintiff was not guilty of such laches as to discharge the defendant in not attempting to recover payment of the note from *Bours & Bascome*; and that sufficient evidence of their failure to pay it was adduced, and that the plaintiff was entitled to recover.

Mr. Justice *Gantt* delivered the opinion of the Court.

But for the usage attempted to be set up in this case, to defeat the plaintiff's right of recovery, there could be no question but that he would have been entitled, upon established and well recognized principles of law, every day enforced, to compel a performance of the contract which the defendant had entered into.

Is there any thing in the alleged custom calculated to make this case an exception?

It is not denied but that the dealing was with the defendant. He bought and received the goods. The plaintiff sent for his money. The debtor had gone to sea. The note of another was taken by the plaintiff's agent. Now, would it be reasonable that the plaintiff should, from this isolated circumstance, unaccompanied with any satisfactory proof, why or wherefore it was done, be debarred the right of recovering the debt from the true and *bona fide* debtor? A custom so unreasonable can never supersede law. The presiding Judge was therefore perfectly correct in saying, that the plaintiff was not confined alone to

the security which the note furnished; unless indeed it had been the understanding and agreement of the parties to the original contract. The terms of the contract, in such a case, would become the law by which it was to be governed, but no such understanding or agreement was proved; nor can it be inferred in any manner from the testimony that this was their intention. The note can only be considered in the light of a collateral security; not in the slightest degree weakening the plaintiff's right to look to the defendant himself.

The defendant has no right to complain; for it does not appear that he had any funds at the time in the hands of *Bours & Bascome*; or, if he had, that the plaintiff was to look to them exclusively for the amount of his debt. And it would be strange indeed if the mere ceremony of an officious, unauthorized act on the part of *Bours & Bascome*, in giving their note, which they have taken care never to pay, should preclude the plaintiff from his just and legal remedy against the defendant.

The Court are unanimous in their opinion, that the verdict should remain, and that the defendant take nothing by his motion.

Justices *Colcock*, *Nott*, and *Huger*, concurred.



Ex'ors of M. SIMONS vs. Ex'or. JOHN S. WALTER.

The plaintiff sued upon a judgment, and defendant offered in discount a receipt for \$136 68, 'in part of this judgment.' To this the plaintiff replied, by introducing in evidence, a receipt from the defendant to the plaintiff for the same amount and of the same date—the Court *Held*, that it was a fact for the jury to determine, whether the defendant was entitled to have the amount of the receipt credited on the judgment, or whether the one was not a sufficient answer to the other.

Where money has been paid by mistake, interest can only be allowed from a demand and refusal.

THIS was an action of debt on a judgment, entered November, 1807, for \$202 09.

The defendant sat up a discount, consisting of the following sums, viz. \$136 68, paid to *M. Simons*, on the 23d April, 1811, and \$48 95 to the sheriff, in full for all costs prior and subsequent to the judgment.

The plaintiffs relied on a receipt of the same date and to the same amount as that produced by the defendant, for \$136 68, and insisted that he was not entitled to credit for it.

The case was tried before Mr. Justice *Gantt*, November Term, 1820, for Colleton district, who charged the jury that the receipt of *Montague Simons* to *John S. Walter* was valid against the judgment, and was not rebutted by that of the same date produced by plaintiffs; and that if the jury should find for the defendant, they might allow interest by way of damages.

They accordingly found for the defendant the sum of one hundred and one dollars, 4 cts. the balance of the aggregate amount of the items of set off, viz. \$303 63, after deducting the judgment for \$202 59, together with interest thereon from the ———

A new trial was now moved for on the following grounds :

1st. Because the receipt for \$136 68, produced by plaintiffs, was a sufficient answer to that for the same sum produced by defendant, and entitled the plaintiffs to a verdict to that part of the discount.

2d. Because his honor erred, as is respectfully submitted, in charging the jury that they might give interest; and that they did err in so doing, inasmuch as it is contended that interest is not due on money overpaid by mistake, until demand and refusal.

3d. Because the jury founded their verdict on an erroneous principle; the real balance being only \$64 52, and not \$101 04, as the jury found.

Mr. Justice *Gantt* delivered the opinion of the Court.

On the first ground, I will remark that it was a question entirely for the consideration of the jury; nor can the Court discover any reason to be dissatisfied, that the find-

ing of the jury was in conformity with the charge of the presiding judge.

It appears by the evidence, that on the 14th of November, 1808, *Montague Simons* gave to *John S. Walter*, a receipt for \$136 68, amount of four bales of cotton, and it was expressed in the body of the receipt to have been paid on account of this judgment. On the same day, he took from *Walter* a receipt for the same amount for cotton sold. Now, it may be asked, why was not the receipt given by *Simons* to *Walter* taken up by the plaintiff's testator, if indeed it was on account of the same four bales of cotton which had been paid for in cash? These receipts may be considered as properly consistent with each other. Other four bales of cotton may have been sold by the defendant's testator at one and the same time, with those paid in part of the judgment; or the plaintiff's testator may, by taking the receipt he did, have intended it as a collateral security against any demand to be made against him, on account of cotton that day sold to him.

The testimony was submitted to the jury in the charge of the presiding Judge, and they were told that it was a question entirely for their consideration.

Upon the second ground taken in the brief, I perfectly coincide with the opinion entertained by the Court, that a new trial should be granted.

Where money is paid by mistake, as in this case, interest can only be allowed from a demand and refusal. It is not allowed on money lent, (*15 East, 223;*) and there is less reason perhaps for saying that it should be allowed, where the person advancing it, does so upon supposition that it belongs of right to the person to whom the payment is made. In that light it ought to be considered until the error is detected, and a demand is made.

This view taken of the second ground in the brief supersedes the necessity of making any comments upon the last ground.

The motion for a new trial must prevail,

Justices *Colcock*, *Richardson*, and *Huger*, concurred.
Grimke, for the motion.
Singleton and *Clark*, contra.

RIVERS vs. GRUGETT.

It was decided in this case that the law of implied warranties applies as well to property exchanged, as to property purchased.

R. GODDARD vs. P. WAGNER.

Trespass *vi et armis* is the proper action for beating plaintiff's slave.

JOSEPH LELAND vs. JOHN M. CREYON.

If the person for whose use goods are furnished be liable at all, any promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds. (a.)

Where the defendant being present with L. in a store, verbally promised to be responsible to the merchant for what goods he might let L. have, and the merchant let L. have goods, and charged them to L. in his books, and afterwards was paid part by L. the promise is void under the statute of frauds; although the merchant made the following memorandum in his book, viz. "The above articles were delivered to L. who was introduced by J. M. C. who agreed to be responsible for what Mr. L. may want in merchandise. Credit was given on said C. becoming responsible." (b.)

THIS was an action of assumpsit, for goods sold and delivered to one *Matthew Leonard*, at defendant's request.

There was no promise in writing by the defendant.

The witness on the part of the plaintiff, proved the delivery of the goods to *Leonard*, who was charged with them in plaintiff's books. He heard plaintiff tell *Leonard* that he would not sell to him unless he obtained security. Afterwards the defendant came there with *Leonard*, and *Leonard* selected the goods which were delivered to him to the value of \$436 72 1-2. But the witness did not hear defendant assume any responsibility, though he under-

stood from plaintiff and *Leonard* that *Creyon* was to be responsible.

There was a memorandum made by the plaintiff, one or two days after the sale and delivery of the goods, in the margin of his book, where the account against *Leonard* was, in the following words: "The above articles were delivered to *Matthew Leonard*, who was introduced by *John M. Creyon*, who agreed to be responsible for what *Mr. Leonard* may want in merchandise. Credit was given on said *Creyon* becoming responsible."

Here the plaintiff closed his testimony, and the defendant moved for a non-suit, on the ground that the promise by defendant for the debt of *Leonard*, not being in writing and for good consideration, was void by the statute of frauds.

The presiding Judge overruled the motion.

The defendant then gave in evidence a letter from the plaintiff to him, in which he stated "that all his endeavors to get the balance due him from *Leonard* had failed; he would thank the defendant to forward said balance of \$236 82. That he had done every thing to get it from *Leonard*, but had given it up altogether. That he had just ground for calling on defendant, as he, defendant, took *Mr. Leonard* by the hand and said, whatever *Mr. Leonard* might want of plaintiff, he, defendant, would be accountable for to plaintiff. That on this and no other principle was credit given *Leonard*. He therefore requested defendant to pay over the balance of *Leonard's* debt.

Here the defendant closed, and contended that the sale and delivery were to *Leonard* and not to defendant. And as defendant had only promised to pay *Leonard's* debt, such promise not being for valuable consideration and in writing, was void by the statute.

The case was tried before *Mr. Justice Colcock*, May term, 1820, for Charleston district, who in his charge to the jury stated, that if they believed the goods would not have been delivered to *Leonard* without the defendant's promise, the credit was given to the defendant, and not to

Leonard, and consequently the promise was not collateral but original, and not within the statute ; and that the memorandum in the margin of the book was simultaneous with the entry, and explained to whom the credit was given, and he thought the defendant ought to be held responsible.

The jury accordingly found a verdict in favor of the plaintiff, for \$ 236 82, the balance of the account.

The present motion was made for an arrest of judgment, and for leave to enter up judgment on nonsuit against the plaintiff ; as the promise of defendant to be responsible for the debt of *Leonard* should have been in writing ; and not being so, the action could not be sustained. But should the court be of opinion that the defendant was not entitled to a nonsuit, then a motion for a new trial is made on the following grounds, viz.

1st. Because the promise of defendant not being in conformity with the second branch of the 4th section of the statute of Frauds and Perjuries, was void.

2d. Because the charge of his honor was erroneous in two material points, and influenced the verdict of the jury. Namely,

1st. In stating that if the jury believed the goods would not have been delivered to *Leonard*, without the promise of defendant, the credit was given to defendant and not to *Leonard* ; and,

2ndly. That the memorandum in the book was simultaneous with the entry, (though made a day or two after,) and was evidence of the credit being given to defendant, though *Leonard* was charged in the said books.

Mr. Justice *Gantt* delivered the opinion of the Court.

By the 2d branch of the 4th section of the statute of Frauds, it is enacted, " that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person ; unless the agreement upon which such action shall be brought, or some memorandum, or note thereof,

shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The defendant relies upon this clause in the statute, as a shield against the present demand. He insists that the plaintiff ought to produce a note in writing of this promise, as it was to pay the account of another.

It is answered on the other side by saying that the credit was originally given to the defendant. And it certainly depends upon the insulated fact whether *Leonard*, the person to whom the goods were delivered, was or was not made a debtor for them? If he was so debited, the alleged promise would be a collateral undertaking, and to all intents and purposes void by the statute. *Leonard* is certainly made a debtor in the plaintiff's books for those goods; and the letter of the plaintiff unequivocally admits that *Leonard* was credited upon the defendant's becoming responsible.

The only evidence furnished of such responsibility however is the memorandum made by the plaintiff in the margin of the book where *Leonard* is charged with the goods. This memorandum, so strongly relied on by the plaintiff, does of itself admit the fact that the credit was given to *Leonard*, upon the defendant's becoming responsible. The plain and obvious interpretation of which is, that if *Leonard* did not pay, defendant was to pay it for him.

Now admit that a memorandum of this kind was to have the effect contended for; is it not seen at once that this branch of the statute would become a dead letter, and that the statute might in every instance be defeated by the mere act of the party concerned in interest? A party might do that for himself which no number of witnesses could establish in his behalf.

The law of the case therefore is, that if *Leonard* was originally liable to be sued for the goods delivered for his use, then the promise of the defendant, if ever made, would be a collateral undertaking, and void.

Now, it is clear that *Leonard* was a debtor, and might

have been sued. If no credit was given to him, it may be asked, why was the book cumbered with an entry making him debtor? Why was not *Creyon* at once charged with the goods? The only correct answer is, that at most the plaintiff considered the defendant as collaterally responsible. *Leonard* was resorted to by the plaintiff as the debtor. Every exertion was made to obtain the debt from him. A part was secured. And it was only after all hope had vanished of getting the balance from him, that the defendant was called on.

One of the leading cases upon this branch of the statute is that of *Buckmyer vs. Darnall*, reported in Lord *Raymond*, 1085. In that case, the plaintiff declared that the defendant, in consideration that the plaintiff, at the request of the defendant, would let to hire and deliver to one *Joseph English*, a gelding of the plaintiff's, undertook and promised the plaintiff that the said *English* would deliver the said gelding to the plaintiff. It was insisted in that case for the defendant, as was done here, that the plaintiff ought to produce a note in writing of this promise within the statute of frauds. The case was one of doubt. *Holt, C. J. Gould* and *Powell*, Justices, were at first of opinion that the case was not within the statute, because they tho't that *English* was not liable upon the contract. Mr. Justice *Powys*, differed. The *Chief Justice* and his associates in opinion agreed, that if any trust was given to *English*, then the case would be within the statute, but they thought that no credit had been given to him. The case was more deliberately considered. The *Chief Justice* advised with the Judges of the Court of King's Bench, and it was finally determined that as *English* might have been charged on the bailment in detinue on the original delivery, the promise made by the defendant was collateral, and within the reason and words of the statute. Mr. Justice *Holt*, in delivering the opinion of the Court, puts this case, a case strictly analogous to the one before us. "Suppose a man comes with another to a shop to buy, and the shop-keeper should say, I will not sell him the goods unless you will under-

take he shall pay me for them ; such a promise is within the statute."

I say the cases are strictly analogous, so far as can be judged of them from the book entries, and the conduct pursued by the plaintiff. What was really said to *Creyon* does not appear by the evidence ; but by no correct construction of the circumstances, can his responsibility be extended beyond the case put by Chief Justice *Holt*.

In *Matson vs. Wharam*, 2 Term. Rep. 81, the line as laid down by Judge *Buller*, must be considered as the correct one ; which is, that if the person for whose use goods are furnished, *be liable at all*, any promise by a third person to pay that debt must be in writing, otherwise it is void by the statute. The same rule is recognized in *Jones vs. Cooper*, (*Cowper*, 227, and *Appendix*, No. 6.) That *Leonard* might have been sued, is unquestionable ; consequently *Creyon's* promise, if made, was within the statute.

No statute has been so much, and, in my opinion, so justly eulogized for its wisdom as the statute of Frauds. This branch of it tends to repress evil practices which would otherwise spring up to the insecurity of all. But for the salutary influence of this statute, thousands would tumble into ruin by having their estates taken from them to answer for the debts, defaults, and miscarriages of others. So far therefore from believing that this branch of the statute of Frauds has a tendency to produce injustice and wrong, I think it the only bulwark of security to shield men from those evils which the statute was intended to remedy. Whether this was a case within the statute, and required that the promise should be in writing to support it, was a question of law. (See the case of *Kent vs. Hutchinson*, 3 Bos. and Pull. 232.) The Court are clearly of opinion that to make the defendant responsible in this case, the promise should have been in writing ; and no such evidence having been adduced on the trial, the presiding Judge should have granted the non-suit which was claimed. It is the opinion of the Court that

the postea should be delivered to the defendant, *with leave to enter up judgment of nonsuit* in the case.

Justices Richardson, Nott, and Huger, concurred.

(a.) See *Matson vs. Wharam*, 2 Term. Rep. 80. *Anderson vs. Heyman*, 1 H. Blac. Rep. 120. 1 Salk. 27. *Buckmyer vs. Darnell*, 2 Lord Raymond, 1085. 1 Saund. 211 a. n. 2.

(b.) *Quere.*—If the memorandum in plaintiff's book should have been admitted in evidence? In the case of *Pritchard vs. McOwen*, 1 Nott & McCord, 131, *in note*, the Court decided that books were not admissible to prove a *special contract*. And in this case, Creyon's promise, if it belonged to any denomination of undertakings, was a *special contract*; and he could only be liable upon that contract. (See 1 Saund. 211 a. n. 2. *Butcher vs. Andrews*, 1 Salk. 23. *Marriott vs. Lister*, 2 Will. 141, &c. The issue would have been upon the assumption of such a contract. The evidence, of course, must have been to that issue. And to have proved the issue would be to prove a special contract; which, by books, is contrary to the law laid down in *Pritchard vs. McOwen*. But its inadmissibility seems still stronger, when it is observed that it was not written with the original entries; but two days subsequent.

Now, although the contract, after the goods were delivered, might be considered so far executed on the one part, as to raise by operation or construction of law, a new promise to pay by the immediate party interested, as if a man agree to build for another a house, for which he is to be paid, and afterwards builds the house according to the agreement, and he thereby gains two ways of declaring, either upon the original *executory agreement*, to be performed *in futuro*, or by *indebitatus assumpsit* or *quantum meruit*, upon the implied promise which arose when the house was actually built, and the agreement *executed*; yet it is conceived that only the immediate party receiving the benefit of the contract could be so liable upon the *general assumpsit*, and that no such action could be sustained against a collateral person, who could only be liable by his express agreement, and not by any implication of law whatever, arising either from consideration received or any other cause. But even if an implied assumpsit could arise, yet it would be upon the proof of the original and special undertaking. Salk. 519. *Lawes on Pleading*, 91.

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J. J. DEBESSE vs. B. NAPIER & Co. Ex'ors LACOSTE.

An order drawn upon an agent in possession of funds, out of which it is to be satisfied, when accepted, fixes the funds irrevocably, and is a good assignment thereof. And the funds do not become assets upon the death of the drawer.

Where a person drew an order upon his agent, who was in possession of funds for the purpose of selling, upon which the agent himself had a lien, and the order was accepted, and the drawer then died, the Court *Held*, that it was essentially an assignment for valuable consideration, and that the agent might sell the property, retain his debt, and pay the order, without making himself liable as executor *de son tort*.

THE defendants were sued as executors *de son tort*, under the following circumstances. Acting as auctioneers, they had dealings to a considerable extent with *Stephen Lacoste*, and had sundry goods in their hands belonging to the said *S. Lacoste*, on which they had made advances. These goods consisted of wines and coffee, the value of which did not equal the advances which had been made. A vessel called the *Two Brothers* arrived, and *S. Lacoste* placed her cargo also in the hands of *B. Napier & Co.* for sale. *Lacoste* was greatly indebted at the time to the *Union Insurance Company* for monies, which, as their president, he had received, and had not paid over or accounted for. He then drew an order on *B. Napier & Co.* in favor of *J. Stoney*, on behalf of said Company, as follows :

“Messrs. *B. Napier & Co.*”

“Gentlemen: Please pay to the order of Mr. *John Stoney* the nett proceeds of sales of the cargo of the schooner *Two Brothers*, after deducting the balance due you, and oblige your obedient servant,

STEPHEN LACOSTE.”

“(Indorsed,) *John Stoney.*”

“Accepted the 25th June, 1812.

“(Signed,) *B. Napier & Co.*”

Lacoste, at the time he drew this order, was indebted to the plaintiff in the sum for which the present action was brought. Some days after the date of the order, and of its acceptance by *B. Napier & Co.* and before any part of the coffee, wine, or cargo of the *Two Brothers* was sold, *Lacoste* died. The defendants afterwards proceeded to sell all the property of the said *Lacoste*, in their hands, as well the wines and coffee as the cargo of the *Two Brothers*, and after refunding themselves their advances to

Lacoste, they paid over to the *Union Insurance Company*, as the indorsers of *John Stoney*, the balance of the proceeds in their hands. The plaintiff contended that by so doing, the defendants made themselves liable as executors *de son tort*, by intermeddling with the estate of *Lacoste*.

The presiding judge directed the jury to find for the plaintiff, which was done.

A motion was now submitted for a new trial on the ground of misdirection by the Judge.

Mr. Justice *Huger* delivered the opinion of the Court.

Two questions arise in this case :

1st. What was the import of the order drawn by *Lacoste* on the defendants? and,

2ndly. What effect had that order upon the rights of the parties subsequent to the death of *Lacoste*?

The defendants had advanced to *Lacoste*, on the coffee and wine, more than their value. Before, however, they were sold, and the balance ascertained, *Lacoste* placed in their hands, the cargo of the *Two Brothers* for sale. On the coffee and wine, the defendants had a special lien for their advances, and only a general lien on the cargo of the *Two Brothers*. Before any of the property was sold, and consequently before any payments could have been carried to the credit of *Lacoste*, he drew an order on the defendants, which was accepted. In this order they are directed to pay to *Stoney*, the nett proceeds of the cargo of the *Two Brothers*, after deducting the balance due them.—What balance? Nothing had been paid on account of the advances, for nothing had been sold, and therefore nothing but the anticipated proceeds of the coffee and wine could have been regarded as a payment, which when sold, did leave a balance of between 3 and \$400 in favor of the defendants. If this was not the intention of *Lacoste*, balance has no meaning in the order. Such a construction however ought to be given, if the instrument be doubtful, *ut magis valeat quam periat.*”

And this view is much strengthened by the fact, which

though not stated in the brief, appears in the account, that the nett proceeds of the cargo of the *Two Brothers* did not amount to the sums advanced to *Lacoste*. The proceeds of the cargo were equal to but \$3,243, and the advances to more than \$3,500. *Lacoste* therefore could not have intended that all the advances made by the defendants should be paid out of the proceeds of the cargo of the *Two Brothers*, and the balance paid over to *Stoney*. It has been contended, however, that such was the understanding of the defendants; as they struck a balance in favor of *Lacoste* in their books prior to the sale of the wine. It appears, however, on examination of the books, that they did no more than carry to the credit of *Lacoste* the proceeds of the different sales as they occurred. It so happened that the wines were sold last, and consequently the sums received by defendants prior to the sale, were more than equal to their advances to *Lacoste*. This however cannot alter the case. It has not been shewn how these books should have been kept, had the defendants supposed themselves required by the order to satisfy their advances out of the coffee and wine before they resorted to the proceeds of the cargo of the *Two Brothers*. Admitting however, that such was their construction of the order, it does not follow that *Stoney's* rights are to be controled by their construction. His rights, if any he have, must depend upon the legal import of the order. Nor was it in the power of defendants, even were they so disposed, to shift their lien from the coffee and wine to the cargo of the *Two Brothers*, to the injury of *Stoney*. They had made advances upon the credit of the coffee and wine, and were bound to exhaust that fund before they resorted to the cargo of the *Two Brothers*. Whenever a factor makes a special agreement for the payment of his advances, he is bound by it, and can not depart from it, to the injury of third persons. *Whitaker's Law of Lien*, 108. 16 *Vesey, Jun.* 280.

I am satisfied that *Lacoste* intended by his order, that the defendants should retain no more of the proceeds of the cargo of the *Two Brothers* than was sufficient with the

proceeds of the coffee and wine to satisfy their advances, and to pay the balance to *Stoney*. The defendants however, it is contended, were not authorized to comply with the order, although accepted before the death of *Lacoste*; as the cargo was not sold at his death, and therefore were assets subject to the order of his administrator.

If the administrator was entitled to the cargo of the *Two Brothers*, or even to the balance of the proceeds after payment of the advances to defendants, they are responsible as executors of their own wrong, for having paid that balance to the assignees of *Stoney*. The smallest intermeddling with the assets is sufficient to constitute an executor of his own wrong. (*Toller*, 37.) It is therefore necessary to determine if the cargo or the balance thereof be assets, and subject to the disposition of the administrator?—The administrator is but the representative of the deceased. He has no powers but such as his intestate possessed. (*Co. Litt.* 207. 2 *Blackstone Com.* 510.) If therefore *Lacoste* had parted with the whole of his property in this cargo, and could not have exercised any further control over it, neither can his representative the administrator.

If the order be regarded as a bill of exchange, on its acceptance, the defendants had a right to retain the cargo; and *Lacoste*, if alive, would have lost all right in it. (*Chitty on Bills*, 41.)

If the order be regarded as a power of attorney given for a valuable consideration, it could not be revoked, and therefore all right in the cargo was transferred. (1 *Bacon*, 321 *Tit. Authority E.*)

It is, however, essentially an assignment for valuable consideration; irrevocable in its nature, transferring all the property of *Lacoste* in the cargo of the *Two Brothers* to *Stoney*.

In the case of *Peyton vs. Hallet*, (1 *Caines' Rep.* 363,) it was decided that an order drawn upon an agent not in possession of the fund out of which it was to be satisfied, when accepted, fixed the fund irrevocably, and was a good assignment,

The same was ruled in the case of *Townsend vs. Feners*, (3 *Johnson's Rep.* 83.)

The case under consideration is much stronger than either of those referred to, in as much as the fund was in the hands of the defendants on whom the order was drawn. As the order was an absolute assignment of the proceeds of the cargo of the *Two Brothers*, irrevocable by the drawer *Lacoste*, and as his administrator could possess no power, which, he did not himself possess, it follows that the proceeds of the cargo of the *Two Brothers* were not assets; and consequently the defendants did not make themselves executors of their own wrong, by paying over the balance to the assignees of *Stoney*.

The motion in this case must therefore be granted.

Justices *Nott* and *Richardson*, concurred.

Justice *Gantt* dissented.

Justice *Colcock* dissenting, delivered the following opinion:

In this case I differ in opinion with my brethren. I think if there be any difference between a contingent and a vested right, that the defendants are liable. It is said the case depends on this question: Had the defendants any goods of their intestate in their hands at his death? And if so, I think the case a very clear one. At the time of his death, the whole of the cargo of the *Two Brothers*, and the previous deposits of wine and coffee, were in their hands, subject to their advances; but taken together, greatly exceeding the amount of them. Now, whose property were the wines and coffee? It is admitted they were *Lacoste's*. Then as to the cargo of the *Two Brothers*, it is contended, that the order operated as an assignment of it to *John Stoney*. That this cannot be the case, may be proven in various ways.

1st. It is paid at the death of *Lacoste*. *Stoney* may have said to the defendants, the goods of the *Two Brothers* are mine, and I have taken possession of them. But this I humbly conceive could not have been,

1st. Because the defendants had a general lien on the

cargo of the *Brothers*, as well as the wines and coffee.

2ndly. Because, from the very words of the order, a lien was created on them. If so, surely *Stoney* could not have taken them out of their possession.

Again, suppose the cargo of the *Two Brothers* had, after the death of *Lacoste*, been burnt, would *Stoney* have been the loser? Would he have been compelled by any Court whatever to credit the demand which he had against *Lacoste*, with what should have been proved to have been their value? I think upon such an event we should have heard him contending most strongly that the property was not transferred by the order. Is there any thing in the law or mercantile usage which goes to shew that property can be thus transferred? Is there any delivery, or that which amounts to a delivery? Is a delivery even contemplated? The order says, pay the proceeds, after deducting your balance. Now, it appears to be inconsistent to say, pay a man the proceeds of his own property. Again, suppose that the wines and coffee should have been destroyed, or proved to be so inferior as to have brought little or nothing, can it be doubted that the defendants had a right to apply the proceeds of the *Two Brothers* to his own debt? I presume not. How does this comport with a property in *Stoney*? How does the word proceeds comport with the idea of a transfer of the thing itself?—Much less can the idea of a transfer of the thing itself be comprehended, when the order means proceeds, if any.—But what is the fact? The defendants did first sell the cargo of the *Two Brothers*, and did apply the money to the payment of their advances. The cargo was sold on the — day of —. The entry in their books on the — is to the credit of *Lacoste*. This is conclusive.—It is an appropriation of the money, and such an one as they had an undoubted right to make. As before observed, if the wines had been burnt the day after the sale of the cargo, the loss would not have fallen on the defendants. It is the law, that if one accepts a bill of exchange on the faith of goods to be consigned, and the drawer die before

delivery, he may still sell the goods. Why? Because there the acceptor is bound to pay at all events. And it is but reasonable he should have a lien on the goods.— The advance is made directly on the faith of the goods.— But in this case it is shewn that there was no responsibility on the defendants, except in the event of a contingency, which he had the power to defeat, and according to the evidence of the case, did defeat. The case quoted by defendant's counsel from 1 *Caines*, (*Peyton & Hallet*,) is much relied on, but is widely different from that before us. It is an order to pay money, which it is admitted is a transfer of the money itself. The case from *Durn. & East*, shews what is necessary to change the property itself.— There, although the conveyance was absolute, and the money loaned on it, yet it was doubted, as the delivery had not taken place before the bankruptcy, (the legal death,) whether the property would pass. And so will it be found that all the other cases referred to, are actual transfers of the property itself. If we had equity jurisdiction, perhaps we might say who should have the disposition of the funds, but we are called upon to decide the strict legal rights of the parties.



WILLIAM ALLEN vs. WILLIAM DONELLY.

Where an attorney was absent when his cause was called, and the case went to the jury, and a verdict brought in and delivered to the clerk, but not recorded, and he obtained the consent of the opposite party to open the case, the Court, after hearing an insufficient affidavit for a postponement, refused to set aside the verdict and to open the case; as it conceived from the affidavit, that the defendant could not make out such a case as would authorize a departure from its long established rules.

ACTION of assumpsit on a note.

In this case the defendant's attorney was called, and did not appear. He had not obtained permission of the Court to be absent. The case went to the jury on the proof of

the hand writing of the defendant. Verdict for plaintiff. Before the verdict was recorded, the defendant's attorney appeared in court, and obtained the consent of the opposite attorney to open the case, and proceeded to read an affidavit to support a motion for continuance.

The court not being satisfied with the affidavit referred to, proceeded with the case ; and the verdict was then recorded.

A motion was now made for a new trial on several grounds, all of which will be considered under the following :

As the verdict was not recorded, the defendant's attorney was not too late to avail himself of the consent of the opposite party to submit a motion for postponement.

2dly. That there was sufficient cause shewn for the postponement of the case.

Mr. Justice *Huger* delivered the opinion of the Court. The proceedings of the court would be extremely embarrassed, if not altogether arrested, were the absence of one of the attorneys, without permission, to be regarded as sufficient to entitle him to set aside the proceedings of the court after the verdict was signed and delivered to the clerk. The affidavit for postponement in this case was permitted to be read, to enable the Judge to ascertain if the defendant could make out such a case as would authorize a departure from the long established rules of the Court. The affidavit, however, so far from furnishing sufficient grounds for setting aside the proceedings in their then state, disclosed such laches, on the part of the defendant, that had not the case been submitted to the jury, a continuance could not have been had.

The motion must therefore be refused.

Justices *Nott*, *Colcock*, *Gantt* and *Richardson*, concurred.

J. H. LANGE, Assignee, vs. FREDERICK KOHNE.

At common law, no chose in action is assignable; and the statute of Ann, and our Act, making notes payable in money assignable, do not include notes payable in paper medium. And a verdict obtained by an assignee will be arrested.

Paper medium is not money; for by the 8th and 10th sections of the Constitution of the United States, Congress alone has the right to coin money; and no state can coin money, emit bills of credit, or make any thing but gold and silver coin a tender.—(a.)

THIS was an action brought on a due bill, of which the following is a copy:

"Due Mr. *John Geyer* one hundred pounds, *paper medium*.

"28th September, 1793.

"For *Frederick Kohne*,

"PETER PATTERSON."

The plaintiff claimed as assignee of *John Geyer*, who made the assignment for the benefit of his creditors. *John Geyer*, the insolvent debtor, was the chief witness; and the general tenor of his testimony, was to prove that the money had been borrowed by *Patterson*, who was a confidential clerk of *Kohne's*, for the use of *Kohne*.

To account for the due bill remaining so long unpaid, the defendant produced no evidence, but relied upon the presumption of payment arising from the lapse of time.

The presiding Judge charged in favor of the defendant; but the jury found a verdict for the plaintiff for the amount of the due bill, without interest.

A motion in arrest of judgment, and for a new trial, was now made upon several grounds.

Mr. Justice *Huger* delivered the opinion of the Court.

It is unnecessary to notice the different grounds for a new trial in this case, as the motion in arrest of judgment must prevail. At common law, a chose in action is not assignable. By the statute of Ann and our act, notes, &c. payable in money, are assignable. The note in question,

however, is not payable in money, but *in paper medium*.— That *paper medium* is not money, appears from the 8th and 10th sections of the Constitution of the United States, which declare that Congress shall coin money; and that no state shall coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts. But the act creating a paper medium, does not pretend to give it the character of money, it only makes it a tender at the treasury.

The motion in arrest of judgment must therefore be granted.

Justices *Nott, Colcock, Gantt, Richardson and Bay*, concurred.

(a.) As to what coin is a tender, see the very able and concise opinion of Judge *Huger*, in *M^r Clarin vs. Nesbit*, 2 *Nott & M^r Cord's Rep.* 519; where accidentally the name of the judge who delivered the opinion of the Court is omitted. R.

A. M. FOSTER vs. CHARLES S. V. JONES.

A judgment and execution in attachment against the garnishee will not be set aside on the ground of the negligence or ignorance of his attorney. And it seems his only recourse is against his attorney, if he neglects to do his duty. And an order made by the circuit court to set aside the judgment, and to give the garnishee time to make his return, will be set aside. (a.)

The garnishee has no right to question the regularity of the proceedings against the absent debtor.

As a security to the absent debtor, the plaintiff in attachment is required to make oath to the debt or sum demanded; but it seems the oath is not required to be recorded or filed; it is only a part of the evidence on which the Court is to bottom its judgment. (b.)

THIS was a case of attachment against the defendant *Jones*, who was absent from the state. A copy of the attachment was served on *Henry Wilson*, as garnishee. An appearance was regularly entered by an attorney, but no return was made by the garnishee. The plaintiff proved his

case, and entered up judgment against the garnishee by default, on the 17th November, 1820. An execution was then issued against him, and a levy made on his property.

In April Term last, the garnishee applied to the Circuit Court to open the judgment, and to permit him to make his return. In support of this motion, he submitted an affidavit, wherein he stated, that when he received the copy of the attachment, he applied to an attorney to manage the case for him, who neglected to do so: that he was indebted to *Jones* but a small sum, and had against him a demand to a much greater amount. That the proceedings in the case were irregular, inasmuch as there was no affidavit of the amount due by *Jones* filed with the proceedings; and that it did not appear that notice had been given as the act requires in such cases.

The Circuit Court set aside the judgment, and gave the garnishee until November next to make his return.

A motion was now made to set aside this order on the following grounds:

1st. That the negligence of the attorney, if any there was, was not sufficient cause for setting aside the judgment.

2ndly. That the garnishee could not take advantage of any irregularities in the proceedings, if such there were, against the absent debtor.

Mr. Justice *Huger* delivered the opinion of the Court.

It is difficult to foresee all the consequences which might result from permitting a party, after judgment and execution, to set aside the proceedings against him, on the ground of negligence or ignorance of his attorney. It would very much tend to destroy all the rules of pleading, and produce endless litigation. It is not among the smallest difficulties, that such a rule would present, to ascertain the truth of the charge against the attorney. The affidavit of the party injured would not be regarded as conclusive evidence of the misconduct of his attorney; and even the admission of the attorney himself could not be receiv-

ed without opening the door to endless fraud and imposition on the opposite party in the record. If the defendant has suffered from the negligence or ignorance of his attorney, he has a right of action against him; and to this he ought to be confined.

On this ground, therefore, the judgment ought not to have been set aside.

If the irregularity complained of can avail any thing, it must go to the destruction of the proceedings altogether.— The order made does not cure them, it only gives further time to the garnishee to make his return. Should the garnishee therefore now fail to make a return, or making a return fail to establish it, and judgment be again entered up, the same irregularity would still exist; the affidavit and notice would still be wanting, and such judgment therefore might be set aside, if the irregularity complained of be sufficient to authorize such an order. The order made in this case is professedly bottomed on the negligence of the defendant's attorney. It could not therefore be contended that it cured the irregularities in the plaintiff's proceedings. The further time asked for making a return, was not granted on any condition. It becomes necessary then to inquire if the garnishee can avail himself of the irregularities stated? The object of the attachment act, is to force the defendant into Court. For this purpose his property is attached. If he come in, he may dissolve the attachment. If he do not come in, the property attached is responsible for the debt due to the plaintiff. If the property attached be in the hands of any person, he is required to make a return thereof into Court by a particular day; or if no person be present when the goods are attached, the sheriff is required to give public notice of his having taken them, and to have them inventoried and appraised. And on filing his declaration, the plaintiff is entitled to the possession of the goods, if he enter a recognizance with security to prosecute his claim, and to return any surplus that may remain after the payment of his debt, &c. As a security to the absent debtor, the plaintiff is required to

make oath to the debt or sum demanded. The oath is not required to be recorded or filed; it is only a part of the evidence on which the Court is to bottom its judgment. The plaintiff is also required, for the same reason, if the defendant have no wife or attorney on whom a copy of the declaration can be served, to give notice once in every three months within a year and a day from the filing of the declaration. If the absent debtor do not then appear, the plaintiff proved his debt and judgment is awarded against the absent debtor. His goods so attached are sold to satisfy the plaintiff's debt. So far the proceedings are certainly against the absent debtor. The garnishee is no more a party to the proceedings than the sheriff. If the first make a return, and no objection be made by the plaintiff, the goods attached are in the custody of the law, as much so as they are when taken by the sheriff. When the sheriff is ruled to shew cause why he does not deliver up the goods, taken by him, to the plaintiff, he has the same right to look into the proceedings against the absent debtor as the garnishee. Both of them are bound to yield obedience to the mandate of the Court, without reference to anterior proceedings. If the garnishee however do not comply with the requisition of the act and make a return, he is made responsible to the amount of the debt proved against the absent debtor; that is, he is presumed by the act to be in possession of goods belonging to the absent debtor to the full amount of the demand, and judgment is awarded against him. If in fact he have goods to this amount, he is only a stake holder, and it must be immaterial to him to whom they are delivered, provided he has a legal discharge. And his compliance with the judgment of the Court will be such a discharge. If he have no goods or goods to a less amount than the demand of the plaintiff, it is his own fault, and must suffer for his negligence. If any contest arise on his return to the attachment, he then becomes interested, and is a party to that contest, but no further. Should the proceedings then in this case have been irregular, as the garnishee is no party to them, he had

no right to question them, and an order to set them aside on his motion would have been improper.

The motion then in this case must be granted, and the order made in the Circuit Court set aside.

Justices *Nott* and *Gantt*, concurred.

Justice *Richardson* dissented.

(a.) See, as to the practice in general, *Schröder vs. Eason*, 2 *Nott & M'Cord's Rep.* 291. *Durant vs. Staggars*, *Ib.* 488. *Donlevy & Co. vs. Cooper & Co.* *Ib.* 548. *Creagh vs. Delane*, 1 *Ib.* 189.

(b.) See *M'Kenzie vs. Buchan*, 1 *Nott & M'Cord*, 205. R.

LOWDEN vs. I. C. MOSES & Co.

Where a new remedy or a new cause of action is given by statute, the plaintiff who would avail himself of either, must bring himself within the statute.

Where a party brings an action against a vendue master to recover money for goods which he had sold, and sets forth in his declaration that the defendant was indebted as *vendue master*, to entitle the case to a preference on the docket, a demurrer, assigning for cause, that the declaration did not state whether the plaintiff proceeded at common law or under the statute, will be over-ruled.—(a.)

The proper time for contesting the right of the defendant, a vendue master, to the benefit of the insolvent debtor's act, is on his application for the same,

If the defendant think proper to dispute the right of the plaintiff to a preference on the docket, in suits against vendue masters, he can always do so by his pleading.—(b.)

THIS was an action brought against the defendants as *Vendue Masters*, for the proceeds of certain goods, wares and merchandise, sold by them for the plaintiff.

By an act passed on the 15th December, 1815, *vendue masters* are excluded the benefit of the insolvent debtor's act, and a preference is directed to be given on the docket to all such cases.

The declaration set forth that they were *vendue masters*; and then followed the usual counts for money had and received, &c.

The defendants demurred, and assigned for cause of demurrer, that it did not appear from the declaration whether the plaintiff proceeded at common law or on the statute, &c.

The demurrer was over-ruled on the circuit; and a motion was now made to reverse the decision of the circuit court.

Mr. Justice *Huger* delivered the opinion of the court.

When a new remedy or a new cause of action is given by a statute, the plaintiff who would avail himself of either must bring himself within the statute. The proceedings however in this case are not under the act of 1815, but at common law. The declaration sets forth that the defendants are indebted as vendue masters, to entitle the case to preference on the docket: As in the Courts of the United States the pleadings must state, that the parties are aliens or citizens of different states to give jurisdiction. So far is the act of 1815 from giving a remedy unknown to the common law, that it repeals in part the insolvent debtors act, which did limit the common law rights of the plaintiff. In the case of *Roseblanch vs. Cleary & Gieu*, it was decided that the proper time for contesting the right of the defendants to the benefits of the insolvent debtors act is on his application for the same.

Should the defendants think proper to contest the right of the plaintiff to a preference on the docket, he can always do so by his pleadings.

The motion in this case is refused.

Justices *Colcock*, *Gantt* and *Richardson*, concurred.

(a.) See Ante, 38, *Misroon vs. Frean*.—R.



A. TUNNO vs. DANIEL FLUDD.

Where a tract of land had been sold by the Master in Equity, and represented upon a map as containing more acres than it was discover-

ed upon a resurvey to have, an abatement will be allowed for the deficiency in the quantity, according to the nature and extent of the defect.—(a.)

The rule of *caveat emptor* does not apply to sales by the master in chancery, for he being the agent of the parties, for whose benefit the sale was made, they are as much bound by his representations as they would have been by their own.—(b.)

THIS was an action of debt on a bond given to the master in equity, for the purchase of a plantation called Brackey, by the defendant, and assigned to the plaintiff.

The bond was admitted. But the defendant contended he was entitled to a deduction *pro rata*, as the plantation had been represented, at the sale, as containing 87 acres more than it really did, as appeared from the resurvey ordered in this case.

At the sale, a plat had been exhibited, by which, the plantation was represented as containing 547 acres; and this number of acres is mentioned in the deed. The lines and boundaries were marked and designated. All of which were correct, with the exception of the length of the lines, which, on the resurvey were found to be shorter; and hence arose the deficiency in the quantity of the land.

The plaintiff replied that the plantation was sold by metes and bounds, and not by the number of acres, and that consequently the defendant was not entitled to any deduction. He further contended that even if the rule were otherwise in ordinary cases, yet, in as much as this was a sale by the master in equity, it must form an exception, and the rule of *caveat emptor*, must apply.

The court directed the jury to allow to the defendant an abatement in proportion to the deficiency of the land, which was accordingly done.

A motion was now submitted for a new trial on the following grounds:

1st. Because the plantation was sold by metes and bounds, and was only represented to contain so many acres, more or less.

adly. Because the rule of *caveat emptor* applies to all sales by the master.

Mr. Justice *Huger* delivered the opinion of the court.

On the trial below, I directed the jury to allow the defendant an abatement for the deficiency in the quantity of the land, on the authority of cases which go as far back as the judicial proceedings of this state are known; and that these decisions were professedly bottomed upon a rule or principle borrowed from the civil law, and unknown to the common law.

In the case of *Gray* and the *Executors of Handkinson*, decided in 1790, (1 Bay, 278,) which was an action of debt on a bond given for a tract of land, to which, at the sale, a mill-seat had been represented as attached, and which was afterwards discovered by a re-survey to belong to another, the defendant contended as the object of his purchase had been defeated, he was entitled to a rescision of the contract; and his defence was sustained by the court.

Chief Justice *Rutledge*, in delivering the opinion of the court observed, "that the rules of the civil law, which had been incorporated with the common law on this head, were of excellent use in determining questions of this nature." "The first was," he goes on to observe, "that wherever the defects of a thing sold were so great as to render it unfit for the use the purchaser intended, and the seller represented in such case, the contract ought to be rescinded;" and secondly, "where the defects were not so great as to warrant a rescision of the sale *in toto*, then such an abatement of the price ought to be made as might be just and reasonable, according to the nature and extent of the defects." By these rules the jury were left to judge of the case before them. They found a verdict for the defendant, and that verdict was sustained. The venerable and learned Judge who reported this case observes in a note, that a number of cases have been determined upon the same principle, both for defects in the *quantity* and *quali*;

ty of land, and for *unsoundness* and *defects* in negroes and other personal property.

In the case of the *State vs. Gaillard* (2 Bay 11) in 1796, which was also an action of debt, on a bond given for a tract of land which had been represented, at the sale, as containing a greater number of acres than were found on a re-survey, with a stream of water running through it, the jury found a verdict for defendant, and thereby rescinded the contract. On an appeal, Mr. Justice *Burke*, who delivered the unanimous opinion of the court, observed, that the principles upon which that and similar cases had been determined were borrowed from the civil law, and now made a part of the common law of this country.— He then quotes the very words of *Domat*, (1 vol. p. 80, 81,) “that a sound price deserves a sound commodity,” and that wherever there is a failure of consideration, a misrepresentation or concealment of material circumstances, it will vitiate the contract *in toto*, or entitle the party injured to such a reasonable abatement in the price of the thing sold, as will compensate him for the misrepresentation, &c.

In the case of *Sumter vs. Welsh*, decided in 1804, (2 Bay, 558,) which was an action of assumpsit on a note given for land, the defendant insisted upon a *pro rata* abatement for the ascertained deficiency in the quantity of the land. It was allowed by the jury; and on a motion for a new trial, the verdict was sustained, (all the judges present), on the ground that the consideration had failed.

So in the case of *Adams & Wylie* (1 Nott & M'Cord 78) decided as late as 1818, where an action was brought on two bonds which had been given for the purchase of a tract of land, this court, on an appeal, decided, that the defendant was at liberty to plead or give in evidence, on a discount, a misrepresentation of the land. The Judge who delivered the opinion of the court, observed, that ever since the case of *Gray and Executors of Handkinson*, it had never been disputed that a *deficiency in the quantity*, or *defect in the quality* of the land, where there had been a representation, are

legitimate grounds for a deduction of price or rescision of the contract, as the case may be.

However dissatisfied I may be with the principles recognized in these cases, I do not feel myself at liberty, now, to interfere with decisions so uniform and so long established. They have been so completely incorporated into our system that more injury is to be apprehended by forcibly rending them from their present naturalized station, than from any evils they may occasionally produce in practice. Had the rules of the common law not been interpolated, I should have been the better pleased; but I am satisfied that this court will always best perform its duty, and effect most good, by adhering to established principles and decided cases.

On the first ground, therefore, I am of opinion that the motion must fail.

On the second ground, it is only necessary to observe that the master being the agent of the parties, for whose benefit the sale is made, they are as much bound by his representation as they could have been by their own.

In the case of the *State vs. Gaillard*, already referred to, the land had been sold by the commissioners of confiscated estates, and yet the court regarded their representation as a warranty on the part of the state, and rescinded the contract.

The motion is dismissed.

Justices *Colcock*, *Nott*, *Gantt* and *Richardson*, concurred.

(a.) From 2 Judge Brevard's *MS. Rep.* 293.—*Columbia, April, 1809.*

H. LIDE vs. WILLIAM THOMAS.

ALL the Judges present except Justice *Wilds*, sick.

Motion for a new trial from Darlington district.

Action of covenant, tried before Mr. Justice *Bay*. The covenant upon which the action was founded, was contained in a deed of bargain, sale and release, from the defendant to the plaintiff, (in consideration of \$500) of 150 acres of land, *more or less*.

The deed pursues the form prescribed by the act, and sets forth that the defendant has granted, and doth grant, &c. to the plaintiff the said land, situated, &c. "on Hurricane creek, containing a mill seat, with a dam, and timber ready for building: which mill seat, dam, pond, timber,

and all other appurtenances to the said premises belonging, I do hereby warrant and defend to the said Hugh Lide, his heirs and assigns forever."

It appeared in evidence that after the plaintiff purchased the premises, he erected saw and grist mills on the same site whereon a mill had formerly stood, and which was referred to in the deed; and that the pond of water was not raised to a greater height than it had formerly been; but the water flowed back upon, and inundated some land which belonged to *Samuel Benton*, who brought an action against the plaintiff for overflowing his land.

Upon the investigation of *Benton's* claim, it appeared that he was entitled to the land which *one half of the water in the mill-pond covered; but not to any part of the land mentioned in the deed of conveyance from the defendant to the plaintiff.*

Benton recovered a verdict against the plaintiff for \$1000, to be released, upon condition that he would forthwith draw off the water from *Benton's* land. In consequence of which, he was compelled to reduce his dam so as to leave a head of water not above three feet high, by which his saw-mill was rendered entirely useless.

It further appeared that the plaintiff could not erect a mill on a more advantageous situation any where on the said land.

Mr. Justice *Bay* was of opinion, and so charged the jury, that the plaintiff was not entitled to recover, since their was no deficiency of the quantity of acres conveyed, and since there was on the land conveyed, a mill seat, dam and pond: and that the covenant or warranty should be construed to extend only to the appurtenances to the land appertaining, and not to advantages or conveniences adjoining or adjacent to the land, or to the capability or sufficiency of the water-pond, of dam.

Verdict for the defendant.

Witherspoon, in support of the motion, contended, that it would appear, from a proper construction of the deed of bargain and sale, that the defendant had covenanted to convey to the plaintiff, by the words *mill-seat, dam, and pond*, a right to appurtenances which did not belong to the land; and that the plaintiff purchased the land under an expectation that he should thereby acquire the possession and enjoyment of sufficient head of water to turn a saw mill. That the water was not raised by him beyond its former height. That the pond was warranted to him according to its former limits or extent. That it was unknown to him when he made the purchase that it extended beyond the limits of the land purchased, and flooded the land of Mr. *Benton*. He purchased under the belief that it did not, and under the impression that at all events the defendant was bound to warrant the premises as represented. That although the defendant could not covenant to indemnify him in committing a trespass on his neighbour's land, yet he could covenant, and had done so, that on the land there was a mill seat and a pond of water sufficient to work a mill, and that this covenant he had

not kept, &c. Deeds ought to be construed liberally, *ut res magis valdeat quam pereat*. 2 *Wils.* 75-8.

Blandy, contra. Deeds ought to be construed according to the intention of the parties. The words, "with the appurtenances to the said premises belonging," shew the intent, and cannot be construed in reconciliation with a warranty of any convenience or advantage not appertenant to the land itself—to the estate conveyed. To extend the meaning of such a warranty to appurtenances of other lands adjacent to the land conveyed, would be absurd and dangerous. The land in question did possess the appurtenances in the deed particularly mentioned. On it was a mill-seat, a dam, and a pond. The warranty was not intended to apply to the goodness or sufficiency of the mill seat, &c. Of these, the purchaser was as capable of judging as the seller.

Mr. Justice *Smith* delivered the opinion of the Court.

It appeared in evidence that the pond, when reduced so as to draw off the water which flooded *Benton's* land, was insufficient to turn a mill. It is evident the parties both contemplated the erection of a mill on the premises, and the use of the land according to its former dimensions.—The fair construction of the contract is, that the warranty was meant to extend to the whole mill-pond, according to its former capacity and extent. It is clear that the plaintiff could have intended nothing else.—It appeared in evidence that the land without the mill-seat was comparatively worthless. The parties, neither of them, it is fair to conclude, knew that the water, by reason of the dam, was raised so as to overflow the land of Mr. *Benton*; and especially, because *Benton* had never before complained of it, or objected to the stopping of the water. But the plaintiff is under the necessity of contracting the pond in order to avoid trespassing on the land of his neighbour, in such a manner, that it is of no use to him in respect to the main object of the contract. He has, therefore, been deceived as to the prime object in making the purchase. The principal consideration has failed. His views and expectations have been disappointed, and he has sustained a considerable loss in consequence of the contract. This loss is imputable to the defendant. It has happened in consequence of his representation and warranty. The plaintiff does not appear to have relied on his own judgment or information, as to the sufficiency of the pond; he relied on the defendant's warranty. It was generally known or believed that the pond was sufficient for a mill, and a mill had been formerly in operation on the place. The words of the warranty, under the circumstances of the case, were calculated to raise the expectation that the whole pond was included in the limits of the land conveyed. That this must have been the impression of the plaintiff, is clear from evidence, *dehors* the deed. This evidence ought not to weigh in contradiction to the deed, or to vary its meaning, if plainly deducible from the deed itself. But evidence was admissible to shew that there was no mill-seat, &c. and to

shew that there was a breach of warranty. The evidence did show that there was no pond sufficient to turn a mill appurtenant to the land, and consequently that the land did not contain a mill-seat; for without a sufficient head of water, there cannot be a mill-seat. It was therefore proved that the defendant was liable for a breach of warranty, and that the plaintiff was entitled to damages.

The opinion and charge of the presiding Judge was incorrect.—Wherefore the verdict must be set aside, and a new trial awarded.

(b.) I suppose, of course, to recover on the warranty, the sale must have been for the purpose of partition, &c. and not by compulsory process, to satisfy a debt. See *Duncan vs. Bell*, 2 Nott & McCord's Rep. 153, and in note 156. R.



JEREMIAH MURDEN vs. GEORGE PERMAN.

The defendant in an action on a bail bond can not be liable to a greater extent than the principal was when the bail became fixed; and the original judgment and cost at the time of the return of *non inventus* is the amount for which the bail is liable.

And the bail is only liable for interest on the original judgment from the time when his liability became fixed by the return of *non inventus* on the *ca. sa.* against the principal; unless the judgment had been, on a penal bond, where the interest would continue to run on, and then he would, perhaps, be chargeable with the accumulated amount.

THIS was an action of debt, on a Bail Bond, tried in Charleston, June term, 1820. Judgment had been recovered against the principal in February term, 1813, but suspended by appeal until June, 1817, when the constitutional court affirmed the judgment. A *ca. sa.* was then issued against the defendant, and returned "*non est inventus.*"

The only question was, whether the bail was liable for interest on the original judgment from the time it was entered up, or only from the time when his liability became fixed by the return of "*non est inventus,*" on the *ca. sa.* against the principal.

The presiding judge being of opinion that the bail was liable for interest from the time the original judgment had been entered up, charged the jury to find to that effect; who found accordingly.

This was a motion to set aside the verdict, and to grant a new trial, on the ground of the misdirection of the Court.

Mr. Justice *Nott* delivered the opinion of the Court.

The bail to the sheriff is liable for the condemnation money and costs: (*Tidd's Prac.* 220, 262. *Mitchell, assignee, vs. Gibbons*, 1 *H. Black.* 76.) And may be liable to the whole extent of his bond. (*Dahl. vs. Johnson*, 1 *B. and P.* 205.) But he cannot be liable to a greater extent than the principal was when the bail became fixed. If the principal had been taken on the *ca. sa.* he might, and indeed must, have been discharged upon the payment of the original judgment, and the costs. That was the amount then for which the bail was liable at that time, and no more. If the judgment had been on a penal bond where the interest would continue to run on, he would, perhaps, have been chargeable with the accumulated amount. But not in this case. The new trial therefore must be granted, unless the plaintiff will release the interest on the original judgment, from the time it was entered up until the return of the *ca. sa.* against the principal.

Justices *Bay*, *Colcock*, *Richardson* and *Huger*, concurred.

Justice *Gantt* dissented.

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CONSTITUTIONAL COURT

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South-Carolina, May Term, 1821—Columbia.

JUSTICES PRESENT THIS TERM.

ABRAHAM NOTT, DAVID JOHNSON,
CHS. J. COLCOCK, JOHN S. RICHARDSON,
RICHARD GANTT, DANIEL E. HUGER.

JOHN ALLEN vs. T. HALL, and others.

The possession of one tenant in common is the possession of both ; and although the unity of possession be destroyed by an actual ouster, that ouster must be either positively proved, or such circumstances must be proved as would support the presumption of an ouster.

And the declaration of a witness (whose credit was extremely doubtful) that the possession of the defendant had been adverse, but not stating why he thought it adverse, nor when it became so, was held not sufficient evidence of an ouster.

THIS was a case in partition.—The parties were tenants in common. The defendants had been in possession for six or seven years before this action was commenced. No rents or profits had been demanded during that period.—One of the witnesses (whose credit was extremely doubtful), stated that the possession of defendants had been adverse ; but why he thought it adverse, he did not state, nor when it became so.

The jury found for defendants.

A motion was now submitted for a new trial, on the

ground that the evidence of an adverse possession was not sufficient to support the verdict.

Mr. Justice *Huger* delivered the opinion of the Court.

The possession of one tenant in common is the possession of both ; and although the unity of possession may be destroyed by an actual ouster, that ouster must be either positively proved, or such circumstances must be proved as would support the presumption of an ouster.

In *Taylor and Prosser*, (1 *Cowper*, 219,) 44 years possession, after a particular estate ended, where more than quadruple the time allowed by the statute of limitations for bringing an account had elapsed, were thought sufficient to authorize the presumption of an ouster. So when the tenant in possession refused admission to his companion, saying, if you come in it must be by law, has been held to be sufficient proof of adverse possession. (See 1 *Mass. Rep.* 333.) But it has been repeatedly ruled that the bare perception of profits only was not sufficient to authorize the presumption of an ouster. (2 *Salkeld*, 423. 5 *Bur.* 2604. and 2 *Blacks. Rep.* 690.)

There is nothing in this case to authorize the presumption of an ouster but the bare perception of profits, unless it be the vague declaration of an uncertain witness, to which I can attach no consequence.

The motion therefore must prevail.

Justices *Richardson* and *Gantt*, concurred.

Justices *Johnson* and *Colcock*, dissented.

Pearson and *Clendenin*, for the motion.

Williams and *M'Cord*, contra.

JAMES H. JOHNS *ads.* ELIZABETH JOHNS.

Where the defendant was executor of the plaintiff's husband, and the plaintiff had a life estate, under the will, in the whole estate, and she continued to live on the plantation, where all the estate was, and had

the same in use, the Court *Held*, that the executor had a right to sell a mare and colt to pay the debts of the testator, and that the widow remaining on the place, where she had a right to be, and where testator's property ought to be kept, and of which she ought to have had the use, could not be regarded as an unconditional assent to her taking the legacy, so as to divest the executor of the right of possession.

THIS was an action on the case. It appeared that the plaintiff was the widow of defendant's testator. The whole estate had been left to her for life. She had continued in possession of the whole property for two years after the death of her husband. Among other things she had possession of a mare and colt, which the executor ordered to be sold to satisfy an execution against the estate. The amount was nine dollars, which she offered to pay, but he refused, saying that there was another debt; and he further proved that he had satisfied another execution to the amount of \$98 and costs.

A non-suit was applied for and refused by the Judge on the circuit. The case was then submitted to the jury, when a verdict was rendered for the plaintiff.

The motion for a non-suit was now renewed in this Court, and for a new trial should it be refused.

Mr. Justice *Huger* delivered the opinion of the Court.

At the instant of a testator's death, the interest in all the personal property he owned vests in his executor. He has an absolute dominion over it, which cannot be destroyed but by operation of law or by some act of his own. (*Toller*, 169, 239.) He is bound to pay the debts; and this is a paramount duty to *satisfying* the legacies. The plaintiff in this case is only a legatee, and ought to have been postponed to the creditors. Nor could she as legatee, (even had there been no debts,) possess herself of the property, without the assent of the executor. If she had, he might have maintained an action of trespass against her for so doing. (*See Toller*, 240, and *Bac. Title Ex'r and Adm'r L. 3, p. 84*, and *Dyer*, 254.) It is contended, however, in this case, that the executor had assented to the possession.

of the legatee, and that his dominion had consequently ceased, and could not be resumed. An executor like every other holder of property, may sell or relinquish possession of it. But his having so done, must, as in every other case, be proved; and the proof must be governed by the same rules, as in other cases. It is laid down in *Toller's Law of Ex'rs.* that a very slight assent on the part of an executor will vest a legacy; and so will very slight evidence satisfy the mind in every case of that having been done which ought to have been done. In this case the debts had not been paid, and as plaintiff was sole legatee, if her continuance on the plantation, where all the assets remained, were a delivery of the property in question, it was a delivery of all the testator had, which would have been wrong, as it was the duty of the executor to retain sufficient to satisfy the debts. The executor had no right to turn the widow out of doors; her remaining then on the plantation, where the cattle, horses, &c. of the testator ought to be kept, and of the use of which she ought not to have been deprived, cannot be regarded as an unconditional assent to her taking the legacy.

The mare and colt being as much under his control as his own property, the plaintiff can no more sustain this action than she could have sustained one for any part of defendant's own property.

The decision of the Circuit Court must therefore be set aside, and a non-suit ordered.

Justices *Johnson* and *Richardson*, concurred.

Mr. Justice *Gantt*, dissenting, delivered the following opinion:

This was an action on the case, brought against the defendant, for a wrong done in taking, without any lawful authority, a mare and colt, and causing the same to be sold, aggravated by the circumstance of its having been done under pretence of legal authority.

Of all the kinds of force which are practised in society, that is the most reprehensible which is done under the

mask of the law, when, in truth, the object is to gratify the malice or promote the gain of the person who commits it. Precisely of this complexion did this case appear before me on the trial of it.

The defendant was an executor under the will of Obadiah Johns, who died, leaving a considerable estate, and little or nowise incumbered. By his will he bequeathed for life the principal part of his property to the plaintiff, his widow, for the support of herself and a number of minor children. The mare, the subject matter of the present action, had been in the possession of the plaintiff upwards of two years, and essentially necessary for the support of the family as a work beast. During that time she had been put to a horse and had a colt.

This mare was levied on to satisfy a small debt due from the estate. The plaintiff in vain urged that she was willing to pay the debt. In vain did she make a tender of the money for that purpose. The defendant said he would sell at all events; he did so, and became the purchaser. It did not appear that any other debt was due from the estate.

Now, it is said that the executor had a power by law to do this, and that the plaintiff was remediless at law; but this I deny, when once the executor has assented to the legacy. Assumpsit will lie for a specific legacy after the executor has assented; and I maintain with confidence, that the only question in this case was, whether the executor had assented or not to the plaintiff's taking possession of this mare under the will; and that was a question which the jury alone could decide, and the case was submitted to them on that specific ground.

They were told of the legal right which an executor possessed by law. That his control over the property could not be interfered with, and that a legatee could not legally obtain possession without the assent of the executor. But that when this was given, he had no right to re-take into his possession property thus given up to the legal owner. That the bequest transferred an inchoate property to the legatee, which was perfected by the assent of

the executor. That the property devolved upon the executor for the payment of debts in the first place, and that before he could safely pay legacies, he was bound to see whether, independent of them, there was a fund sufficient for the demands of creditors. That the property became absolutely vested by the executor's assent, &c.

Now the assent of the executor may be inferred either from expressions or acts; as to congratulate the legatee on his legacy, or if he requests the legatee to dispose of a house bequeathed to him. No particular form of assent has been prescribed by law. The assent may be expressed or implied, absolute or conditional. A very slight assent is held sufficient. (1 Vern. 94, 460. 4 Bac. Abr. 405.) Here the mare was called and known as the plaintiff's; she had remained with her for two years, and every presumption growing out of the circumstances that the assent of the executor accompanied the possession. In a freak, and to gratify his malevolent disposition against a mother, charged with the support and protection of a family, this executor seizes upon a favorite animal of the life owner, and in despite of every persuasion, and without any the least necessity, he proceeds with violence to sell, under the pitiful pretence of satisfying a debt due, and which his mother offered to pay up. The owner may, in such case, maintain an action at law for the wrong done. In 4 Bac. 445, it is said, an action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest; a *fortiori* will an action upon the case lie, after his assent, and possession given of the legacy. I thought on the trial, and still continue of that opinion, that the evidence which the trial furnished was abundantly sufficient to shew the implied assent of the executor. That was a question too for the jury, and distinctly submitted; and their verdict having found the fact and afforded redress for an outrage of a flagrant nature, I think this Court have no right to interfere with it.

Butler and Butler, for the motion.

Brooks, contra.

JOHN BLACK *ads.* J. PEARSON.

The parties referred their disputes to five arbitrators. Award by *three* for the plaintiff. Two dissented. An action was brought on the award, to which the defendant demurred, because the *five* arbitrators should have concurred. Demurrer overruled.

IN this case the parties had referred their differences to five arbitrators, three of whom concurred in an award in favor of the plaintiff; the other two dissented. To an action brought on the award, the defendant demurred, on the ground that the five arbitrators should have concurred to entitle the plaintiff to his action.

The Circuit Court overruled the demurrer.

A motion was now made to reverse that decision.

Mr. Justice *Huger* delivered the opinion of the Court.

I overruled this demurrer below on the authority of *Lockhart & Kidd, 2 Cons. Rep. 217*. The Court is satisfied with that decision, and will therefore not disturb it.

The motion is refused.

Justices *Nott, Johnson, Richardson, Colcock* and *Gantt*, concurred.

Creswell and *McDuffie*, for the motion.

O'Neal and *Irby*, contra.

J. A. GRIMES *vs.* JOHN GOWEN.

The fee bill does not allow § 5 36 "for special matter and argument" in a summary process case, as in others.

Half costs are allowed only upon *liquidated* demands, and upon '*open accounts*.' Where the party has the means of regulating his demand by the sum really due, and chooses to go for more, if he recover less than § 50, he is allowed but half costs, but when he has not the means of regulating his demand by any standard, and claims damages to an uncertain amount, as for a breach of warranty, if he recover even less than § 50, the act does not reduce his costs.

IN this case a summary process had been brought on a breach of warranty, as to the age and soundness of a horse purchased of defendant by plaintiff. The damages were laid at \$ 85. The case was submitted to a jury on the motion of defendant. A verdict for \$ 15 was found for plaintiff. The clerk allowed full costs, and \$ 5 36 for special matter and argument, as in other cases tried by a jury.

Mr. Justice *Huger* delivered the opinion of the Court.

I was of opinion when this case was submitted to me in the Circuit Court, that the words of the fee bill were general, and that only half costs were allowed in all cases, when the demand amounted to less than \$ 50. The words of the act I find are not so general. Half costs are given only upon "liquidated" demands, and upon "open accounts." Where the party has the means of regulating his demand by the sum really due, and chooses to go for more, if he recover less than \$ 50 he is allowed but half cost; but when he has not the means of regulating his demand by any standard, and claims damages to an uncertain amount as for a breach of warranty, if he recover even less than \$ 50, the act does not reduce his costs.

The fee bill does not allow \$ 5 36 for "special matter and argument" in a process case as in others. The words of the act are for commencing and prosecuting, and defending a suit by summary process £ 1. which has always been held to exclude all other fees for proceedings prior to execution.

Justices *Nott*, *Johnson*, *Richardson*, *Colcock* and *Gantt*, concurred.

Davis, for the motion.

Earle, contra.

NIMROD KELLY vs. THOS. PAYNE, Sheriff.

In debt, against the sheriff, under the act of assembly allowing a person 50 per cent against him for money collected and not paid over, the allegation of non-payment is a sufficient assignment of the breach.

THIS was an action of debt, against the sheriff, on the act, to recover 50 per cent on a sum of money collected by him and not paid over.

A verdict was had for the plaintiff.

A motion was submitted to arrest the judgment, on the ground that no breach was assigned in the declaration.

Mr. Justice *Huger* delivered the opinion of the Court.

The breach is the non-payment of the money, which is assigned in the declaration.

The motion is dismissed,

Justices *Colcock*, *Johnson*, *Richardson*, *Nott* and *Gantt*, concurred.



Cook and others vs. NANCY WOOD.

In trespass to try titles, if the plaintiff die *pendente lite*, and leave minors, the statute of limitations can not run during their minority.

The Court divided as to the question—Whether the statute of limitations, after it has once commenced to run, can be stopped by any disabilities?

Where it was proved that the records of the Clerk's office had been almost entirely destroyed, and that the few that remained were in a mutilated state, the Court admitted the journals of the court in evidence to prove that an action had been commenced, and abated by the death of the plaintiff.

TRESPASS to try titles.—Greenville district.

The plaintiffs produced a grant to *Alexander Ray*, of whom they were the heirs, dated 1783.

The defendant relied on a grant to *Moses Wood*, the deceased husband of the defendant, dated 1784, and possession from 1794.

The plaintiffs in reply proved that *Alex. Ray* died about 1797, leaving the plaintiffs minors, who brought this action immediately after they all came of age. They also proved that since 1797, the records of the former district

of Washington, of which Greenville was then part, had been almost entirely destroyed, and that the few that remained were in a mutilated state. The clerk however had been able to find the journals of that district, from which it appeared that *Ray* had commenced an action of trespass against *Wood*, within two years after he went into possession. An order of survey was also found, and several subpœna writs in that case; and in 1797 an entry was made, from which it appeared that the suit had abated by the death of *Ray*.

A verdict was had for the plaintiff.

A motion was made for a new trial, on the following grounds:

1st. That the statute of limitations having commenced running in the life-time of *Ray*, it was not arrested by his action against *Wood*, or by the minority of his children.

2ndly. That if an action commenced by *Ray* could have arrested the statute, there was not sufficient proof of the existence of that action, and of its abatement by *Ray*'s death.

Mr. Justice *Huger* delivered the opinion of the Court.

I thought on the trial of this case below, that the plaintiff ought not to be injured, if possible, by the negligence of an officer of the Court, and the effects of a division of Washington district. They were not only minors at the time of the division, but had they been of age, could not have prevented the destruction of the records, as over them they could not have exercised any control. The loss of the writ, declaration and pleadings, in my opinion, was sufficiently accounted for to admit of the inferior evidence afforded by the journals, and in this opinion all my brethren concur.

The first ground involves two questions:

1st. The statute having commenced running in the life-time of the ancestor, was it arrested by the minority of his children? And

2ndly. If it could not, was it arrested by the action

commenced in his life time, and which abated at his death?

The first is "*questio vexata*," and has for some time divided this Court. In the case of *Fussoux* and *Prather*, (1 *Nott & Mc Cord's Rep.* 296,) it was ruled by a majority of the judges, then present, that the statute having once commenced running, was not arrested by a subsequent disability. It is known however that the Judges were then, and are now supposed to be equally divided on that question. Had I been a member of the Court at that time, I should probably have regarded myself as bound by the prior decision in *Rose & Daniel*, in which it was ruled that a subsequent disability did arrest the statute. I shall always feel great reluctance in overruling a decision of this Court. If its decrees are not to be regarded as unalterable, they ought at least to be touched with great caution, and only reversed for the most urgent reasons.—Such acts of the legislature as repeal former laws, are only prospective in their operation. A new rule established by this Court, must always have an *ex post facto* operation. An act declares what shall thereafter be the law—a decision of this Court what has been the law. It is better never to reverse a decision than to do so frequently. Under existing circumstances, however, I feel myself at liberty to adopt either rule. If, indeed, there be any consideration, independent of intrinsic merit, in favor of either, it must be for the last. *Faysoux & Prather* has gone forth as the last decision of this Court, and the community have regarded it as the settled rule. I think too there is no common law Court, either in England or in America, which has decided differently. I have searched and can find no case but that of *Rose & Daniel*, in which the contrary opinion has been held as settled. All the American acts appear to have followed the statute of James. Where any difference is apparent, it is verbal and not substantial, and our own act does not differ more from the statute of James than the American acts generally. The same object appears to have been sought in all—the repose of society. It is only consistent with the wisdom of those who

framed these acts, to believe that it was their intention to throw into total oblivion, all transactions beyond a certain date, and thus periodically to relieve society from much perplexity and trouble.

Give to these acts however, the construction contended for in *Rose & Daniel*, and great would be the evils left, unremedied evils that would frequently baffle the most cautious, and constantly involve the unwearied.

It is true that under the other rule, injustice will sometimes occur. This must be the case with all general rules.

I am satisfied that much more is to be apprehended from the rule in *Rose & Daniel*, than that in *Faysoux* in *Prather*. At least such appears to have been the opinion of those who have legislated, both in England and America; for however we may doubt with regard to the meaning of our own act, we can not doubt that the statute of James, and the acts of the different states have been correctly construed by English and American Courts; and by all of them, (as I have before said,) it has been decided that when the statute once commences to run, it is not arrested by a subsequent disability.

I have been induced to express an opinion on this point, rather from a wish to give all the stability I can to the decision in the case of *Faysoux & Prather*, than from its importance to this case. I decided below, that the action commenced by *Ray*, and which had abated by his death, had stopped the statute, and that his heirs, who were minors, were not barred before they arrived at the age of twenty-one.

An action having been brought by *Ray*, it was not running when he died. He had been diligent in asserting his right; and no possible laches could be imputed to him. Had he lived to this moment, and things had remained as they were at his death, defendants plea could not have availed him. The death of *Ray* was the act of God, from which no one can suffer. (*See 3 Caines' Rep.* 206.) Nor can they suffer from any act not their own. (*See Mathew & Phillips*, 2 *Salkehl* 424; and 2 *Strange* 719.) They

can only suffer for their own laches, and of this they were not guilty. They brought their action soon after they were of age, and before that time they could not.

It has been frequently held, that where the creditor brought an action within the time, but died before the suit was ended, but after the statutory time had expired, the executor had at least one year to renew the suit. (*See 3 Caines Rep.*) And where the suit has been retarded by contests about the will, a longer time has been allowed to the executor. (*See 3 Caines Rep. 2 Salkeld, and 2 Strange, 907.*) If difficulties excuse an executor, impossibilities must protect a minor.

The motion is dismissed.

Justices *Nott* and *Johnson*, concurred.

Mr. Justice *Colcock* :

I concur that the action did stop the running of the statute ; but, independent of that the minority of the plaintiffs protected them. I do not even think that the doctrine on which it is contended *Faysoux & Prather* can be supported can apply to this case.

Justices *Richardson* and *Gantt*, concurred with Justice *Colcock*.

M Duffie, for the motion.

Earle & Davis, contra.

SARAH SANDERS vs. J. RUTLAND, Adm'r. of JOHN T. HALL, deceased.

Where the father and mother of an infant, but a few years old, died and left some property, but neither an executor nor any person to take care of their child, and a woman, who was poor, took the child and supported it for a year, and then administration was taken out upon the estate, the Court *Held*, that the woman should recover for her expenses and trouble in taking care of, and maintaining the child ; and that her poverty rebutted the presumption of a gratuity, and that the humanity and policy of the law required that it should be paid.

THIS was a summary process against the defendant as administrator of the estate of the father and mother of an

infant, about five or six years old, which the plaintiff, a poor woman, had boarded and taken care of for a year.— There was no administration at the time the child was taken. There was no relation or other friend on whom it particularly devolved to take care of it. It further appeared that the child was entitled to a very good estate.

The decree below was for defendant. A motion was now submitted to reverse that decree.

M^cCord, for the plaintiff. An executor or administrator is liable for a duty which ought to be performed by the testator, were he alive. (*Sollers vs. Lawrence, Wills Rep. 421.*)

It is the duty of a parent to provide for the maintainance of his child. The administrator or executor is his representative. (*Moses vs. M^cFarlane, Buller, N. P. 130.*)

There are many cases where the law will imply an obligation to repay for property obtained by trespassers and felons. (*Thomas vs. Whip, Bull. N. P. 130, &c.*)

But the law directly allows of acts of necessity being performed, and satisfaction for such acts. As defraying expenses of funeral, advancing money to pay debts, providing necessaries for his children, &c. (*Toller, 40.*) But these expenses must be suitable to the deceased's estate and quality. (*Off of Exec. 174. 3 Bacon, 22.*)

But all this does not make an executor *de son tort*; who is allowed all payments which a rightful executor is liable to pay. (*2 Chanc. Rep. 33. 2 Jac. L. D. 508.*) Much more ought she to be allowed it, who commits no *tort*.

Mr. Justice *Huger* delivered the opinion of the Court.

Infants are responsible for necessaries, and miserable would be their situation, if it were not so. In this case, prior to administration, there was no legal representative of the intestate's property. There was no person on whom it particularly devolved to take charge of the infant. If its property were not responsible for its necessaries, it might have starved, though entitled to an abundance. For saving the child from want and starvation, the plaintiff

ought not to suffer. Her poverty rebuts the presumption of a gratuity; and the humanity and policy of the law are on the side of the plaintiff.

This case has been brought within the equitable jurisdiction of the Court, where the usual forms of proceeding are dispensed with; the motion must therefore prevail, and a new trial be ordered.

Justices *Johnson* and *Nott*, concurred.

Mr. Justice *Richardson*, dissented.

Glover, for the motion.

McCord and *Footman*, contra.

LYON LEVY vs. WADE HAMPTON.

Twenty years without any payment or acknowledgment, will raise the presumption of the payment of a bond; but even then the presumption may be rebutted by any circumstances which will tend to shew that it was not paid. Less than twenty years, with other circumstances going to show that there was payment, may be sufficient.
(a.)

The Court of law can make no distinction between two joint obligors, where there is no distinction made in the bond itself.

A bond bearing interest from a period anterior to its date, is not usurious.

A co-obligor is not like an indorser, absolved from liability by the negligence of the obligee, although he may be only a security; for the common law makes no difference between co-obligors; they are both absolutely and unconditionally liable.

RICHLAND district.—Spring Term, 1821. Tried before Mr. Justice *Gantt*.

This was an action on a bond, bearing date 2nd January, 1802, payable in 1802 and 1803, signed by the defendant and *John Bostick*, for the payment of six hundred and forty-nine dollars and 97 cents. It appeared in evidence, that on the 27th July, 1812, *Bostick* was sued on this bond, and that judgment was obtained on the 10th May,

1815. An execution was issued on the 10th May, 1815, and a second execution on the 7th February, 1818. The defendant's signature was proved, and that *Bostick* was solvent until 1814. The land for which the bond was given was sold by *Bostick*. And it was alleged that the mortgage given by *Bostick* to procure the payment of this money, was not recorded by the treasurer. The condition of the bond recited that it was given for a tract of land, and that the sum was to be paid with interest, from a period anterior to the date of the bond.

The defendant pleaded *non est factum*, payment and usury.

Nothing was said on the first plea, as the bond was proved. On the second plea it was contended :

1st. From the lapse of time between the date of the bond and this suit, payment should be presumed.

2ndly. That the defendant was security to *Bostick*, and that the negligence of the public officer to record the mortgage had destroyed a fund which would have been appropriated to the payment of the bond, and the relief of the defendant. That that circumstance, together with the long indulgence to *Bostick*, was a want of diligence which should exonerate the defendant from his liability to pay the bond. And on the third plea, it was contended that an agreement to pay interest from a time anterior to the date of the bond was in effect to secure the payment of more than seven per cent. per annum.

The jury found a verdict for the defendant, and a motion was now made to grant a new trial, because the verdict was contrary to law.

Mr. Justice *Colcock* delivered the opinion of the Court.

On the first plea nothing need be said. As to the presumption of payment arising from lapse of time, the doctrine is well settled. Twenty years without any payments, will raise the presumption of payment ; but even then the presumption may be rebutted by circumstances which will tend to shew that it was not paid. A less time, with other circum-

stances, going to shew that there was payment, may be sufficient. Now as to time alone, there were about 17 years between the time when the bond became due, and the action against this defendant. The time alone then is not sufficient. Are there any circumstances to induce a belief of payment? None; but on the contrary the most conclusive to shew that the bond never was paid. The suit against *Bostick*, the defendant co-obligor, with the sheriff's return on the execution, and the general belief of his insolvency, all shew that the bond was not paid. The verdict then as to this ground is contrary to law.

On the second ground of argument, that defendant is discharged by the laches of the plaintiff; I know no means by which a court of law can distinguish between the responsibility of the obligors to a bond, where no distinction is made in the bond itself; and here there is none. If it be a fact that the defendant was only a security, and that the mortgage not being recorded, enabled the principal, *Bostick*, to dispose of the land, and if it be also a fact that the defendant has sustained an injury thereby, it may furnish a ground of relief in another court, but it cannot avail him here; for we have no means of enquiring into those facts. We cannot call upon a defendant to say whether he has not been long ago indemnified. As for the parallel which is attempted to be drawn between the situation of the defendant and an indorser, it cannot hold; for in the one case the party is absolutely and unconditionally bound, in the other he is only responsible on the happening of a contingency, with which, when it does happen, he must be made acquainted. An indorser, then, if not called on when a bill falls due, may reasonably conclude that it has been paid. Not so with the obligor to a bond. If he wishes to avoid the consequences of the insolvency of his co-obligor, diligence must be exercised by him.

As to the plea of usury, it is sufficient to observe, that nothing is more common or more just than that a bond which is given some time after a purchase made, should

bear interest from the time of purchase ; and there is nothing to shew that this was not the case in this instance.

The motion is unanimously granted.

Justices *Nott, Richardson, Gantt, Huger and Johnson*, concurred.

Yeter, Solicitor, for the motion.

W. F. De Saussure, contra.

(a.) See the cases collected in 1 *Nott & McCord*, 167.



RICHARD M. TODD vs. C. E. WILLIAMSON, and DAN'L.
M'KIE vs. EUNDEM.

A party may bring an action upon a magistrate's decree, although the execution had issued, and property levied on, but where the following endorsement was made by the constable upon the execution, "no further proceedings, the property given up to defendant, as there were executions at the sheriff's office binding the property, of which notice was given me."

THIS was a case within the summary jurisdiction of the Court, founded on a magistrate's judgment.

Exception was taken by the counsel for the defendant, that inasmuch as it appeared in evidence, by an entry on the execution, which had been issued on the judgment, that a levy had been made on the goods of the defendant, and that it was incumbent on the plaintiff to shew in what manner the levy had been disposed of before he could entitle himself to a decree.

The case was tried before Mr. Justice *Gantt*, Spring Term of 1821, for Richland district, who decreed in favor of the plaintiff.

This was a motion for a new trial, on the ground above stated.

Mr. Justice *Gantt* delivered the opinion of the Court.

I thought on the trial of this case, and am still of the

same opinion, that the burthen of the proof lay on the defendant, to shew that the judgment had been satisfied. A levy made may raise a presumption, and only so, that the execution has been satisfied by a subsequent sale of the goods levied on; and if such was the fact, the affirmation could be easily made to appear by the adduction of the testimony in support of it by the defendant himself. The entry, however of the levy, on the back of the execution, was accompanied with a statement, which shewed that no further proceedings had taken place.

After stating that the execution had been levied on a side-board, the constable making it, adds the following words, "no further proceedings; the property given up to defendant; as there were executions at the sheriff's office binding the property, and notice of which was given me by the sheriff of Richland district."

The motion for a new trial must fail.

Justices *Colcock*, *Johnson* and *Richardson*, concurred.

Mr. Justice *Nott*:

I concur in this opinion, because the execution shews how the property was disposed of.

Mr. Justice *Huger* concurred with Justice *Nott*.

Maxcy, for the motion.

Levy, contra.

PATRICK DUNCAN vs. C. BREITHAUPT, Esq. and the Honorable D. E. HUGER, executors of the last will and testament of BENJAMIN C. YANCEY, Esq. deceased, attorney at law.

In suits requiring great professional labor, where much time must necessarily be consumed, and diligence and skill required, in the preparation and management of them, an attorney may rightfully and legally charge, by way of counsel fee, a sum proportioned to the value of the services; and which a jury of the country, upon evidence before them, are competent to ascertain and decide upon. (*a.*)

THIS was an action of assumpsit on a note of hand, given in the life-time of the intestate to the plaintiff for \$810.

On the part of the defendants, a discount for professional services rendered by the deceased, and amounting to \$1,500, was relied on in the defence.

The following facts were satisfactorily established by the testimony, viz:— That the deceased had been employed by the plaintiff as counsel in the celebrated cases of the Jews land, in Abbeville district. The occupants of those lands had been greatly anxious to retain the deceased as counsel in their behalf, and had offered him as a retaining fee from one thousand to twelve hundred dollars. A retaining fee to that amount, in those cases, would have been but a moderate allowance to a gentleman of Mr. Yancey's professional character and talents. On being retained by the plaintiff, the deceased used great diligence and exertion. He came from Charleston to the back country twice, to attend to the arrangement and preparation of those suits for trial. Each visit should be estimated at five hundred dollars. His last visit being at a time when it was dangerous to leave the city, had cost him his life. Those facts were for the most part testified to by gentlemen of undoubted respectability and integrity of character, (Messrs. *Whitner* and *Lomax*,) and who were particularly acquainted with the fact of the deceased having used his best and ablest exertions to promote his clients success. Mr. *McDuffie* too, the gentleman afterwards employed by the plaintiff, and who conducted those causes to a successful termination, testified, that a retaining fee of one thousand dollars to the deceased would have been moderate.

For services thus proved, so important in their nature, where the confidence and trust must have been so unbounded, emanating from a thorough and just sense of the extraordinary skill of the counsel employed, added to the consideration of the immense value of the property in contest, these, together with the successful termination of the question of legal right in favor of the plaintiff, induced the jury, (after deducting from the discount the amount of principal and interest due upon the note,) to find a verdict in favor of the defendants for the balance, amounting to

§ 300. The present was therefore a motion for a new trial, on the following grounds :

1st. Because the services rendered were anterior to the date of the note, and the jury ought to have presumed compensation for them had been rendered.

2d. Because the services were not worth the amount allowed by the jury.

3d. Because there was no evidence of a contract between the parties.

4th. Because it appeared that if the services were rendered, they were rendered to Nicholson and Duncan, and not Duncan, the plaintiff alone; and that the pretended services could not be legally discounted against the above plaintiff alone.

Mr. Justice *Gantt* delivered the opinion of the Court.

The defence in this case rests upon the doctrine of implied contracts ; a principle not confined in its operation, but applying indiscriminately to every employment. Under this head, *Blackstone* (443) says, " Implied contracts are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As if I employ any person to do any business for me, or perform any work ; the law implies that I undertook or contracted to pay him as much as his labour deserves." I take it therefore to be a correct and legal principle, that in suits requiring great professional labour, where much time must necessarily be consumed, and diligence and skill required in the preparation and management of them, an attorney may rightfully and legally charge, by way of counsel fee, a sum proportioned to the value of the services, and which a jury of the country, upon evidence before them, are competent to ascertain and decide upon. The handicraftsman employed to lay the foundation, and plan the superstructure of a house, can look with confidence to the law for a full indemnity for his services ; and the law mechanic, in a great and difficult case, where mental skill and bodily exertion are to unite, in the foundation and struc-

ture of a suit at law, more than ordinarily complex and difficult, may with equal confidence and right look to the same principle for his indemnity. It would reflect infinite discredit to the law were it otherwise, whose rule is reason, and whose voice is justice and truth.

It is certainly not a new case that gentlemen of the law are sometimes called upon to take part in the management of causes of great weight and difficulty, which do not stand upon the footing of ordinary suits, and which, in justice to themselves they could never undertake, unless the principle before advanced was made applicable to them. At various times gentlemen of distinguished talents have been called on to afford occasional assistance in the important contest about the Jews land. My brother *Nott*, who resided in the interior part of the state, when at the bar, was paid \$500 for once attending at Abbeville court. And although I do not know the fact, yet I am persuaded that *Col. Drayton*, of distinguished talents, and who resides in the city of Charleston, must have received, when called on for a similar purpose, double that sum.

The property in contest, equal in value to a Royal Domain, had been claimed by several, among whom the present plaintiff had never been named as a claimant, till evidenced by those actions. The name of *Yancey*, as being of counsel for him, added weight and importance to his claim. And well it might, for who more distinguished than the deceased in the line of his profession? Who ever possessed a more lofty spirit, or more towering mind? Who better calculated to stem the torrent of prejudice that was likely to arise from an attempt to dispossess so many settlers, of what, by possession and lapse of time they considered their proper freehold? These were the weighty considerations which induced a selection of this gentleman; who, with great professional skill and learning, united as much of firmness and intrepidity as ever was possessed by mortal man. Such was the man in right of whose widow and minor children the defendants in

this case, under the peculiar circumstances attending it, felt it their duty to set up the discount before noticed.

It is worthy of remark that the plaintiff does not deny the applicability of the doctrine of implied contracts to this case, with the declaration that the fee charged was too great. The only objection which he advances is, that the presumption of law in his favor, of payment having been made, had been disregarded by the jury. Now the law does presume, in various instances, for the purpose of promoting the great ends of justice and right, as in the application of the principle of the law against himself, as regards an implied undertaking on his part; but when it is made to apply to the question of payment, the declaration as drawn by the plaintiff, is not legally correct.

In the first place it is not true, in point of fact, that the services had been all rendered before the date of the note. Years of diligence were to be devoted to these cases before they could be placed in a proper train for trial. Prudence and caution were to be observed at every step and stage of the proceeding. And this continued to be the case long after the note was given; payment therefore could not be presumed. Besides payment, if made, is capable of being proved, and the law imposes the burthen of this proof upon the person on whom the obligation to pay rests.

In the instance before us, we find that the deceased was actually engaged in making preparations, nay, devoting the last moments of his existence in the service of his client; dying, I may say, for him, that his suit might live. Under such circumstances, would not any liberal and generous mind have felt indignant at the idea of \$ 800 being recovered by the plaintiff out of the little pittance left by the deceased, not equal to the support and maintenance of those whom he held most dear; without the plaintiff having, at the same time, furnished to the jury, who were called upon to allow his demand the most satisfactory evidence, that the important services rendered by the deceased had been amply and honorably remunerated? No such

evidence was offered, and the jury were too just to presume that compensation had been rendered.

These observations apply with equal force to the second ground taken in the brief; that the services were not worth the amount allowed by the jury.

They certainly were better judges of this fact than the plaintiff; and when it is remembered that juries are apt to scan, with a cautious eye, the exhibition of a demand, such as was presented to their view by the defendants in this case, the prompt manner of finding their verdict to the full amount of the limited discount which had been filed, not only does the highest credit to the jury who tried this case, but is demonstrative of their certain conviction, that the charge for service as rendered in, was altogether just and legal. I believe that had a larger sum been demanded, the jury would have felt themselves bound to have allowed more, in justice to the representatives of the deceased. The deficiency, however, can only be expected at the hands of another jury, or from a more correct view on the part of the plaintiff, of the obligation he was under to reward those services.

On the third ground, of their being no evidence of a contract between the parties, I have already shewn that the law itself implies a contract in a case like the one before us; and it is well for the representatives of the deceased that it does so.

As to the fourth and last ground taken, that the services were rendered to *Nicholson* and *Duncan*, and not to the latter alone, and therefore could not be discounted against the plaintiff in his individual capacity, I have only to remark that this may have been the fact, and if it were so, there can be no doubt but that Mr. *Nicholson*, who has been bred a lawyer, and whose mind has been thereby liberalized, will know too well the obligation which he is under to withhold from the representatives of his deceased brother, the reward due to services rendered in his behalf. Mr. *Nicholson*, however, was not a party to the record. The plaintiff, Mr. *Duncan*, was the ostensible claimant in those

cases, and the client of the deceased; and as such, was certainly a fit subject for the discount filed to operate upon alone.

The prominent facts then which arrest the attention in this case, and point with force to the conclusion which ought to be drawn from them, are, the great value of the property in contest; to which may be added, the doubtful nature of the right to be tried. The legal discernment and skill required in the arrangement and management of causes, involving principles complicated in their nature, and difficult of solution, the awakened anxiety of the client, embarking in such a contest, these considerations attach on the side of the employer. On the part of the attorney, the flattering and (from universal practice,) I will add just expectation, that an ample remuneration would await his professional exertions, the laudable anxiety not to disappoint the fond hopes and high expectations entertained by the client, public opinion, a self approving consciousness of merit, these, with ten thousand other honorable incentives, which present themselves to liberal and correct minds, and which lead to infinite labor and exertion on the part of the counsel retained, certainly entitle him to a reward, which ordinary causes do not call for or allow. Cases of the description of the one now before us, may be said therefore to form an exception to a general rule; and in all such there can be no question but a jury, where compensation is withheld, is the proper tribunal to ascertain and fix the allowance, which reason and justice demand.

On this occasion I think they have acted correctly in finding the verdict which is here complained of; and therefore that the motion for a new trial should not prevail.

Justices Colcock, Johnson and Nott, concurred.

Mr. Justice Richardson, dissented.

Feter, for the motion.

Simkins and McDuffie, contra.

(a.) See the next case.—R.

The Hon. WILLIAM HARPER vs. C. E. WILLIAMSON.

Where an attorney brought an action against a client for costs and counsel fees, for a case which he had managed in a Court of Equity, the answer of the defendant, in the hand writing of the attorney, and signed by him as attorney, and sworn to by the defendant, furnishes the highest evidence that can be required, that the service was performed at defendant's request.

And although there were two other defendants, yet by reference to the answer, it appeared that their names were added *pro forma*, and that the defendant was the only one of them really interested in the case, and both of the others swore that they had not employed the counsel. But in the case of defendants, if a party be omitted, the objection can not be taken under the general issue, where it did not appear on the face of the declaration, or on any other pleading of the plaintiff, that the party omitted, jointly contracted and was still alive. (*a.*)

THIS was an action of assumpsit, brought to recover one hundred and twenty-five dollars, for fees due the plaintiff as solicitor in the court of equity. The demand consisted of three distinct items; one for drawing two answers in equity, in a case wherein the defendant and his wife were defendants, and separate answers were required. The second for drawing the joint answer of this defendant and two others; and the third for arguing a cause, attending references before the master, and other services. The first item was taxed by the commissioner, and therefore allowed by the jury: The others were rejected.

This was a motion for a new trial, on the ground that the verdict was contray to evidence.

Mr. Justice *Nott* delivered the opinion of the Court.

The first item in the plaintiff's demand is admitted to be correct, because it is taxed by the commissioner. But that is not necessary where there is other satisfactory evidence that the services were rendered.

The answer in the second case is in the hand writing of the plaintiff, and signed by him, and sworn to by this defendant. This furnishes the highest evidence that can be required that the service was performed at his request.

It is true there were two other defendants. But by a reference to the answer, it appears that their names were added *pro forma*, and that this defendant was the only one of the three really interested in the case. They also swore that they did not employ the plaintiff; and of course he must have been employed by *Williamson*.

But it is not material in the present state of the pleadings, whether he was employed by the defendant alone, or by all of them jointly. The plaintiff was entitled to recover. A new trial must therefore be granted on that ground.

It is not necessary to give an opinion on the third item; that will depend on the evidence to be given on the next trial.

Justices *Johnson* and *Huger*, concurred.

Mr. Justice *Richardson*, dissented.

Nott & McCord, for the motion.

W. F. De Saussure, contra.

(a.) See 1 Chitty's Plead. 29. 1 Saund. 284, n. 4. &c. R.



WILLIAM MILES vs. SAM'L JAMES and JAMES JOHNSON.

A ferryman is liable as a common carrier. (a.)

It is the duty, as it seems, of every ferryman to have his flat so constructed that it may be easy for carriages of all descriptions, and drivers of all capacities to enter them.

By the act of Assembly of 1809, it is made the duty of every person keeping a ferry to keep the banks in repair.

The mode and manner in which a carriage is to be received into a flat must be regulated by the ferryman, and if a person requests assistance and directions, and the ferryman refuses, but tells him to proceed, and he thereupon proceeds to enter the flat, and in making the attempt, his property is injured or lost, the ferryman is liable; for when the traveller is directed to proceed, all matters of discretion, which the law gives to the ferryman, will be thereby transferred to the passenger, and the possession of the property will be considered as being in the ferryman.

KERSHAW district—Spring Term, 1821. Tried before Mr. Justice *Johnson*.

This was a summary process, to recover the value of some articles lost out of a cart, in attempting to cross — ferry, then kept by the defendant *Johnson*.

The plaintiff was an old man, blind in one eye, and seeing badly with the other. He came to this ferry, driving his cart, with two horses in it, in good order, and accompanied by his wife and daughter. The weather was very bad, and the bank of the river slippery. As they got to the house of *Johnson*, who lived near the river, they went in and asked him to go down and assist them in crossing. This he refused to do, saying to them, go and pay your ferriage to the negro, and he will put you over. When they reached the flat, seeing the state of things, the daughter again went to the defendant *Johnson*, and requested him to come and aid them. He again refused; swearing he would not wet his foot for any of them that day. She returned, and the negro brought the flat as near the bank as he could; and to facilitate the entrance of the cart into the flat, (or perhaps to enable it to enter,) he placed a piece of wood at one end of the flat, and some brush at the other. He then directed the plaintiff to drive in, which he did; but in entering, the wheel which struck the solid log, entered with ease, the other which ran over the brush sunk down, and caused a violent jirk to the horses, which threw them out of the proper direction, and the other wheel entered on the edge of the flat, and ran along it some distance, and then into the water. Cart, horses, and driver followed, (*rari nantes in gurgite vasto*,) and every thing in the cart was lost.

The presiding Judge decreed for the defendant; conceiving that the loss was the result of the inability of the driver.

A motion was now made for a new trial; because the facts proved, created a legal responsibility in the defendant.

Mr. Justice Colcock delivered the opinion of the Court.

I can not think that the case is one which depends on the view which may be taken of the evidence ; for in any view of it, the defendant is liable. Nor is the defendant alone liable as a common carrier, the goods having been clearly delivered to him. For the case furnishes, in my opinion, the evidence of direct negligence, on the part of the defendant *Johnson*. In the case of *Rutherford vs. McGowen*, (1 *Nott & M'Cord*, 17,) it was decided that a loss which resulted from the breaking of a chain, although recently made and apparently strong, should be born by the ferry owner. In this case, it is said to infer from the testimony, that from the state of the bank, and that of the flat, the cart could not enter without something being placed under the end of the flat. The ferrymen did place something to effect this object ; which was insufficient to support the wheels, from the insufficiency of which the loss clearly resulted. Here then is direct negligence ; for it is the duty of the ferryman to have his flat so constructed, that it will be easy for carriages of all descriptions, and drivers of all capacities, to enter them. A flat should not present to the traveller greater difficulties than are usually met with on the high road.

But it was suggested that the bank was rendered bad by the weather. This only imposed on the ferryman the greater necessity for an apron or drop to his flat. It can not at any rate furnish an excuse ; for by the act of the 20th December, 1809, it is made the duty of every person keeping a ferry to keep the banks in repair. (2 *Brevard*, 196.) The common law, however, would require that his flat should be adapted to the situation of the bank, and that it should be so constructed as to meet any state in which it would be ordinarily found. That this was not the fact, can not be even doubted. Here then the case might rest. Enough has been said to shew the liability of the defendant ; but as the principles involved are of great importance to the community, I think it proper to shew that the defendant is liable in every possible view which can be

taken of the case. I think then, even admitting that the cart went over in consequence of the want of skill in the plaintiff, that the defendant is liable; for the plaintiff *quoad hoc* was his agent. He applied for assistance twice, was refused, and was desired to go on. The mode and manner in which a carriage is to be received into a flat must be regulated by the ferryman. He may take out the horses and lift the carriage in, or drive it, or cause it to be driven in. When the plaintiff was directed to proceed, this and all other matters of discretion, which the law gives to the ferryman, were by him transferred to the plaintiff.

This view of the subject is further supported by the law, declaring that ferries shall be kept by white men. (*2 Brevard*, 191.) The negro then could not be in law his agent. But if the case depended on the determination of the skillfulness or unskillfulness of the driver, I do not think there is any evidence of a want of skill.

It is said the old man was nearly blind, yet it is apparent that he saw well enough to strike the objects which were placed to enable him to enter the flat with the wheels of the cart. So far there was no want of skill. Now I am at a loss to know how it is ascertained that any degree of skill or physical power would have kept the horses in the flat. The *impetus* given to the bodies of the animals, by the resistance of the wheel which was left out of the flat, may have been greater than human skill or power could resist; and is it unreasonable to suppose that as the one wheel which was properly supported, entered the flat, that the other, if equally well supported, would also have entered? Does not this enquiry again lead us back to the insufficiency of the material which was intended to support the wheel, and shew that from that proceeded the loss?

The motion is granted.

Justices *Gantt* and *Huger*, concurred.

Justice *Richardson* dissented.

Holmes, for the motion.

Levy, contra.

(a.) See *Cook vs. Gourdin*, 2 *Nott & M'Cord*, 19. R.

SCACE BROOK WATSON vs. WILLIAM HILL.

One tenant in common may maintain an action to try titles, and can recover whatever proportion of land he may show himself entitled to. By the act of 1797, if a person die intestate, leaving neither wife, child, or children, or lineal descendant; but leaving a father or mother, and brothers and sisters, or brother and sister, or brothers or sisters, one or more, the estate, real and personal, of such intestate, must be equally divided amongst the father, or if he be dead, the mother and such brothers and sisters as may be living at the time of the death of the intestate, so that such father or mother, as the case may be, and each brother and sister so left living by the intestate, shall each take an equal share of his estate, real and personal.

Marion district—March Term, 1821. Tried before Mr. Justice Johnson.

THIS was an action of trespass to try titles, in which the jury found the following special verdict:

“We find the land in dispute was granted to *James Watson*, who died since the year 1798, without issue and intestate, seized and possessed in fee of the said lands, leaving the plaintiff, his father, and brother, *Scace Brook Watson*, jun. and four sisters, *Leonora*, wife of *James Ralls*, *Sarah*, wife of *Bryan Ralls*, *Elizabeth*, wife of *Dawson Waters*, *Polly*, wife of *Jesse Ford*, then and still living. We also find the defendant guilty of the trespass. And if the court should be of the opinion, the plaintiff is entitled to recover in this action, we assess his damages at five dollars.—But if the Court should be of opinion he is not entitled to recover, we find for the defendant.”

A motion was now made for leave to enter up judgment on the above special verdict, for one sixth part of the land.

Mr. Justice Colcock delivered the opinion of the Court.

One question involved in this case has been long settled. If one joint tenant or tenant in common sue, he shall be permitted to recover whatever portion of the land he may shew himself entitled to. (*McFadden and wife vs. Haley*, 2 Bay's Rep. 460. *George Perry vs. Thomas Middleton*. *Ib.* 539.) In the first case it is said, “there is no necessity that the verdict should agree precisely with

the declaration. All that is necessary is, that the thing for which the verdict is given should be *comprised in and form a part of the thing demanded*. The verdict may be for whatever the party can prove a right to, and the judgment may be so moulded on it as to meet the substantial justice of the case." And 2 *Bulst.* 184, is referred to. In the latter case it is said to have been settled in other cases as well as the case of *McFadden vs. Haley*. Under the construction of the act of 1791, the plaintiff would have been entitled to the whole tract of land. But the amendatory act of 1797, (1 *Brev. Dig.* 426. 2 *Faust*, 146,) enacts, that from and after the passing of the act, "in all cases in which any person shall die intestate, leaving neither wife, child, or children, or lenial descendant; but leaving a father or mother, and brothers and sisters, or brother and sister, or brothers or sisters, one or more, that the estate, real and personal, of such intestate, shall be equally divided amongst the father, or if he be dead, the mother and such brothers and sisters as may be living at the time of the death of the intestate, so that such father or mother, as the case may be, and each brother and sister so left living by the intestate, shall each take an equal share of his estate, real and personal;" by which, the father is entitled to one sixth part of the said tract of land; and it is therefore ordered that he have leave to enter up judgment for one sixth part of the land described in the declaration, and the damages assessed by the jury.

Justices *Nott, Johnson, Richardson, Huger* and *Gantt*, concurred.

C. Mayrant, for the motion.

Witherspoon, contra.

GERVAIS GIBSON et ux. vs. WM. BROWN et al.

In cases of partition, costs are to be paid by all the parties concerned.

Chester district—Fall Term, 1820. Tried before Mr. Justice *Johnson*.

THIS was a case of partition to divide certain lands among the respective persons entitled to shares therein.—The applicant, after the distribution, taxed costs as in a case of trespass, to try title. Upon motion, the presiding Judge ordered the taxation to be set aside.

A motion was now made to set aside the said order, on the ground that the applicants are entitled to costs as a matter of right, or under the act of 1799, or some other act of the state.

Mr. Justice *Colcock* delivered the opinion of the Court.

As at common law costs are not recoverable, and when given by statute are usually regulated by the quantum of damages recovered, here, from the nature of the proceeding, no damages are given, and it would seem absurd to say costs should be allowed where there are no damages. This is clearly established in the case of *English and Denton*, (2 *Nott & M'Cord*, 376,) decided at the Spring Sitting, 1820. The act of 1791, regulates the fees which shall be received and taken by certain officers who are entitled to fees for the different services in the respective suits in this act specified and contained, in lieu of all other demands whatever for said services; and to attorneys in the Superior Courts of law for cases of dower and partition says, "all fees from the commencement to the end of the proceedings, all services inclusive, surveyors fees extra, £ 5." Which sum is to be paid by all concerned; for in all cases of minority, an application to the Court is indispensably necessary, and in all others advisable, and is equally beneficial to all.

By the 27th section of the act of 1791, (1 *Brevard*, 348) it is directed "that at whatever stage any suit may cease or determine, the attorneys, clerks and sheriffs shall have their fees taxed, and on non-payment thereof, executions may be issued against the party from whom they are due." Now from whom are these fees due? From all the parties to the partition. The taxation then, if any take place,

must be against all the parties to the proceeding, and not against those who are called on to shew cause why the partition should not take place.

The motion is dismissed.

Justices *Nott*, *Johnson* and *Huger*, concurred.

Mr. Justice *Richardson*, dissented.

Mr. Justice *Gantt*: I am of opinion that if the summons be by consent of all interested, then the £5 are to be paid by the estate; otherwise when it becomes necessary by the obstinacy of any one against whom it issues; then it devolves on him.



DAVID TAYLOR *ads.* WILLIAM HAWKINS.

Where the age of the defendant had been written in a bible, the Court *Held*, that such memorandum in the book was not the best evidence of his age, but that he might prove it by a person who swore from mere recollection of the fact of his birth.

Newberry—March Term, 1821. Motion for a new trial.
Tried before his honor Judge *Gantt*.

THIS was a suit by summary process on an open account. The plaintiff being a merchant proved the account from his books. The defendant pleaded infancy. To support this plea, the defendant introduced a witness who proved his infancy, but stated that he had acquired his knowledge from a family register, or a memorandum in a family bible. The written register not being produced, the evidence of this witness was rejected.

The defendant offered to prove his minority by a witness who could speak from recollection of the defendant's age. But the Court rejected this witness also, on the ground that the defendant's minority could not be established without producing the written evidence disclosed by the first witness, and decreed for the plaintiff the amount

of his account. The defendant moved the Constitutional Court for a new trial, on the following grounds :

1st. The evidence of the first witness proved the defendant's infancy.

2d. The second witness ought to have been sworn and examined, to prove the defendant's infancy.

Mr. Justice *Colcock* delivered the opinion of the Court.

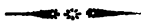
The evidence offered was competent, and should have been received. The private memorandum of an individual is of itself no evidence. When produced, it requires to be supported by an oath. It is considered as aiding the recollection of the witness, but not of the foundation of his knowledge : Thus the clerk who is called to prove a merchant's sum, and introduces the book of original entries to refresh his memory. But he may prove the delivery of the goods without the book ; and in this case the witness may have proved the age of the defendant, (although such entry existed) from mere recollection of the fact of his birth. In short it is the very best evidence which the nature of the case admits. If no other evidence could have been had, the memorandum, upon proof of the hand writing, may have been admitted. Even the declarations of a deceased parent have been admitted to prove the birth of a child. (*Phillips*, 178-9.)

The motion is granted.

Justices *Nott*, *Richardson*, *Johnson* and *Huger*, concurred.

Bauskett, for the motion.

Oneal and *Johnson*, contra.



MARTHA SANDERS vs. RANDOLPH PALMER.

A trespass must be proved as laid.

Where the declaration stated, that a trespass had been committed on a certain day, upon a Horse and Cow, proof that the trespass was com-

mitted on the Horse in 1817, and on the Cow in 1820, will not support the declaration.

If the trespass be of a permanent nature, in which the injury is continually renewed, the declaration should state it with a *continuando*.

Spartanburgh district—Spring Term, 1821. Tried before Mr. Justice *Huger*.

THIS was an action of trespass for an injury to a horse and two cows. There was but one count in the declaration, alleging the trespass to have been committed on the same day on the horse and cows.

The plaintiff proved the trespass on the horse in 1817, and offered to prove the trespass on the cows in 1820.

The defendant objected to the testimony, insisting that the plaintiff ought to elect a trespass.

The Judge overruled the objection, and charged the jury that they were authorized to find for both trespasses.

A verdict was given for the plaintiff for one hundred dollars.

And a motion was now made for a new trial, because the plaintiff could not recover for two distinct trespasses, three years remote from each other, under a declaration containing a single count, and alleging the trespasses on a single day.

Mr. Justice *Colcock* delivered the opinion of the Court.

No rule in pleading is better established, than that the *probata* and *allegata* must correspond. Now the charge here was, that on a given day a trespass was committed on a horse and two cows, and the proof was, that on the day mentioned in the declaration, a trespass was committed on the horse alone. The reason of the rule is obvious. If one thing could be charged and another proved, how could a defendant come prepared with testimony? In the case before us what was there to induce the defendant, when called upon to answer for a trespass alleged to have been committed in 1817, to know that he was to be prepared to answer for another committed in 1820? Would the exhi-

bition of one charge be sufficient to require him to answer for the transgression of a whole life? Surely not.

It is a rule that if the trespasses are of a permanent nature, in which the injury is continually renewed, the declaration should state it with a *continuando*. But where the injuries and acts terminate in themselves, and being once done, cannot be done again, there can be no *continuando*. As killing a number of horses, each of which is a separate act, these are to be declared on as done *diversis diebus et vicibus*, between such and such a time. (1 *Espinasse N. P. Gould Edi. part 11, 295.*) And in 2 *Chitty*, 367, note (s) it is said; "But if only one day be mentioned, the plaintiff will not be permitted to give evidence of more than one act of trespass; and for this refers to the highest authorities. The evidence therefore ought to have been rejected, and the motion is granted.

Justices *Nott, Johnson, Richardson and Gantt*, concurred.

M'Duffie, for the motion.

Gist, contra.

WM. A. COLCLOUGH et. al. vs. CHARLES RICHARDSON
et. al.

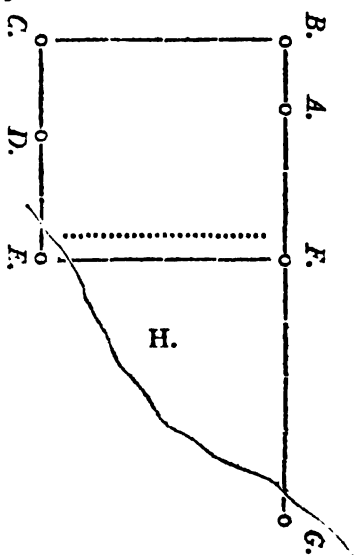
The general rules of surveying are, (1) that natural boundaries should govern, (2) artificial marks, (3) course and distance. Generally speaking, the first ought to control, because the most permanent and certain; but a correct location consists in the application of any one, or all of these rules to the particular case; and when they lead to contrary results, that must be adopted which is most consistent with the intention apparent on the face of the grant.

And course and distance, though the feeblest and most liable to err, will control natural marks or boundaries, where it is apparent on the face of the grant that they were inserted by mistake, or laid down without regard to rule, or where they do not in fact exist, or are found at such a distance from the other marks of location, as to render it unreasonable to presume them. And there is a distinction, it seems, when a water-course is called for as a boundary, and when it is represented as running through the tract.

SUMTER, MARCH, 1821.

THIS was an action of trespass to try titles to land. The parties claimed under different grants, from which their titles were admitted to have been derived ; so that the only question was the location of the plaintiff's grant.

The plat annexed to this grant represented a square tract containing 200 acres ; and it appeared on the face of it, that it had only been run and marked from the point A. to B. C. and D. (see diagram.) The rest evidently had never been run or marked. And locating it according to course and distance, from these points, the lines B. C. E. and F. were given, and found to contain 255 acres ; and if located on this principle, the plaintiff was not entitled to recover, the trespass being at H. But a small creek called Half way-swamp, was represented in the original plat, as passing in, near the corner F. and running along just within the line, and out near the corner E. represented by the dotted line ; and upon the resurvey, the creek was found to run from G. to E. and passing through the corners as here represented.



The plaintiff insisted that the line B. F. should be extended to G. and close from thence to E. by the creek, to preserve the creek as a natural mark called for in the original, and if closed in this way, the defendant was a trespasser, and the plaintiff was entitled to recover.

The jury found a verdict for the defendant, locating the plaintiff's grant by the lines B. C. E. and F.; and a motion was now made for a new trial.

Mr. Justice *Johnson* delivered the opinion of the court.

The grounds which have been taken in support of the present motion, consist rather of a course of reasoning on the general principles of location, and do not state any distinct proposition which the Court are called upon to decide out of the general principles. It will be sufficient therefore, on the present occasion, to apply the general rules to this case, and to enquire whether they are at variance with the finding of the jury.

The general rules are :

1st. That natural boundaries, 2d. Artificial marks, and 3d. Course and distance, should govern the location. Generally speaking the first ought to control every other, because it is the most permanent and certain; but I apprehend that a correct location consists in the application of any one or all of these rules to the particular case; and when they lead to contrary results, that must be adopted which is most consistent with the intention apparent on the face of the grant. Thus course and distance, the feeblest and most liable to error, will control natural marks or boundaries, where it is apparent on the face of the grant that they are inserted by mistake, or laid down without regard to rule; as in the case of *Bradford vs. Pitts*, (*2 Constitutional Rep.* 115); or where they do not in fact exist, or are found at such a distance from the other marks of location as to render it unreasonable to presume them; and so of a variety of other cases, which may be imagined, and are found to exist.

A distinction I think too exists where a water-course

is called for as a boundary, and where it is represented as running through the tract, as in this case. In the first case experience shews that they are laid down with more attention to rule, and in the latter case very many are found to be laid down by mere conjecture ; as was the case in *Bradford vs. Pitts*. And that such was the case in the present instance, is apparent from the following considerations :

1st. The plaintiff's plat represents the tract as a square, and locating it in the manner now contended for, you get the figure represented by lines B. C. E. G. extending the line B. F. to double its distance.

2d. The grant calls only for two hundred acres, and locating it in the square B. C. E. F. there are 255 acres.

3d. The lines never were run, except from the point A. to B. C. and D. So that it is apparent that the creek was laid down by conjecture. The surveyor never saw it.— Upon what principle then is it contended that the line B. F. should be extended to G? To preserve the creek as a natural mark, is the reply ; and the same reason would justify extending it to the distance of five, ten, or an hundred miles ; and if marks or boundaries, evidently conjectural, are invariably to be made the basis of location, as the strongest evidence, a confusion, the consequences of which cannot be foreseen, would be the result. I do not wish to be understood to say, that they ought to be disregarded ; so far from it, I think they ought to be preserved, and to control all others, when it is even probable they were regarded in the location. But I cannot consent that they should govern, when it is evident they have been laid down by mere conjecture, and without regard to principle or rule.

I am therefore of opinion that the present motion cannot prevail.

Justices *Colcock*, *Gantt* and *Huger*, concurred.

Miller, for the motion.

W. F. De Saussure, contra.

Surviving Ex'rs of MANN vs. Adm'rs. of JAS. TAYLOR.

Interest can not be recovered upon a *Scire Facias*.

THE plaintiff had originally brought an action of debt on a penal bond, conditioned for the payment of money, in which he recovered; and in May, 1808, entered up his judgment for the penalty. At which time the principal and interest was equal to, if it did not exceed, the penalty. The judgment being unsatisfied, the plaintiff sued out a *scire facias*, and in 1817, judgment went thereon against the defendant by default; and upon a reference to the clerk, he assessed damages for the plaintiff to the amount of the interest, which had accrued subsequent to the rendition of the judgment in 1808. The amount of the first judgment, (the penalty of the bond,) and all the costs, had been paid.

A motion was made in the Court below for an order, that satisfaction should be entered on the judgment on the *scire facias*. The motion was granted; and the plaintiff now moved to set aside that order, on the ground, that he was entitled to the damages, assessed by the clerk, as interest.

Mr. Justice Johnson delivered the opinion of the court.

The act of 1815, under which the clerk supposed himself authorized to assess damages in this case, was not, I apprehend, intended to give interest when it was excluded by the forms of proceeding. If for instance, a plaintiff, in declaring on a single bill, lay his damages at one shilling, a jury would not be at liberty to give him more; on the general principle that the plaintiff cannot recover more than is laid in his declaration, whatever the interest might have amounted to. On this subject the act contemplated no change, it was only intended to authorize and point out the mode by which a plaintiff might recover interest, which accrued after judgment, and before satisfaction, in those cases, where the original cause of action *bore interest*.

That interest cannot be recovered in proceedings by *scire facias* must be apparent to every one who will turn their attention to their form and character; and the authorities on this point are very satisfactory. (*Vide 3 Burrows*, 1789, *Knox vs. Costello*. 2 *Lord Raymond*, 1532, *Henriques vs. The Dutch West-India Company*. *Strange*, 809.)

The motion is therefore refused.

Justices *Colcock*, *Gantt*, *Richardson* and *Huger*, concurred.

Gregg, for the motion.

Stark, contra.



HARTWELL MACON vs. ISRAEL G. MATHIS.

Where a Judge has granted an order to docket a cause, that order can only be set aside by the Constitutional Court.

Tried at Sumter, March Term, 1821.

A MOTION was made before Judge *Johnson*, at the last term for Sumpter district, to strike this case from the writ of enquiry docket, on the ground that the declaration was not filed on or before the first day of the second term, after the return of the writ, as required by the rule of Court.

In shewing cause against this motion, the plaintiff produced the following order, which had been obtained at Chambers, immediately after the adjournment of the court on the last day of the preceding term, viz. "*Hartwell Macon vs. Israel G. Mathis*. On motion of *A. Silliman*, ordered, that this case be docketed on the writ of Enquiry docket, October 14, 1820."

"(Signed,)

C. J. COLCOCK."

In reply to this, it was objected that this order was *ex parte*, and without notice to the defendant. But Judge *Colcock* reported, that he had granted the same motion in

open Court, before the adjournment, in the presence of the defendant, who was also the clerk of the Court, and ordered it to be entered on the journals. That after the Court adjourned, it was represented to him that the defendant had neglected to enter the order, and refused to put the case on the docket, and he then gave the order above stated.

Judge *Johnson* refused to grant the present motion, and the case came before this Court, on a motion to reverse that decision, on the grounds taken in the Court below.

Mr. Justice *Johnson* delivered the opinion of the court.

Whether the order in this case be regarded as having been granted at Chambers or in open Court, is wholly immaterial. In either view the Circuit Court had no power to rescind it; one Judge has not the power of rescinding the decisions of another. But it cannot be otherwise regarded than an order made in open Court; and the subsequent written order was only, an additional sanction to what had been previously done, intended to leave the defendant no excuse for disobeying it; and if the defendant was aggrieved by it, his remedy was an appeal to this court.

It is with difficulty I can persuade myself to think seriously of the present motion. To say the least of it, a more groundless one has never found its way into this Court; and the counsel would, I think, deserve censure, but for the well known fact that the defendant was himself long, (perhaps twenty years) a practitioner, well skilled in the technical rules of practice, and astute in their application. His pretence that he had no notice of the motion is without foundation, and his conduct as clerk, in refusing to enter the order on the journals, and to docket the cause conformably thereto, is highly reprehensible.

Justices *Nott*, *Colcock*, *Richardson*, *Huger* and *Gantt*, concurred.

S. D. Miller, for the motion.

W. F. De Saussure & Holmes, contra.

WILLIAM TAYLOR vs. NATHANIEL DRAKE, and MARY,
his wife.

The summary process jurisdiction of this Court is not concurrent with the jurisdiction of the Court of Equity. It only furnishes a different method of trying cases within the jurisdiction of the Court before such proceedings were established.

Tried at Sumter, March, 1821.

MRS. Drake, the wife, had a separate estate, and this was a summary process to charge that estate, which was in the hands of the husband, as trustee to the wife, with an account for goods sold to the wife for her own use, and for the benefit of the separate estate.

The pleadings presented to the Court below, the question, whether the Court had or had not jurisdiction of the case?

The Court decided that it had not, and a motion was now made to reverse that decision,

Mr. Justice *Johnson* delivered the opinion of the court,

A trustee is not chargeable on account of the trust estate, beyond the funds in his hands ; and to ascertain this, a discovery and an account would be necessary in almost every possible case ; and there is no doubt that these cases are included in the general jurisdiction of the Courts of Equity.

It is contended for the plaintiff, that the act of 1769, giving to the Court of Common Pleas summary jurisdiction of cases under £20, gives a concurrent jurisdiction with the Courts of Equity, in all cases under that amount. The act, after speaking of the general jurisdiction of the Courts of Common Pleas, provides, that "It shall and may be lawful for the Judges in the said Courts, or any of them, to determine without a jury, in a summary way, on petition, *all causes cognizable in the said Courts*, for any sum not exceeding £20 sterling, except when the title of lands may come in question : In which suit, the plaintiff and defendant shall have the benefit of all matters, in the

same manner as if the suit were commenced in the ordinary forms of common law or equity, and the said judges are hereby required so to do, and to give judgment and award execution, together with costs, against the body or goods of the party against whom the same shall pass." (1 *Brevard*, 221. *Public Laws*, 270.) The latter member of this clause, it is said, confers a concurrent jurisdiction. I apprehend, however, that it refers only to the mode of proceeding, and never was intended to confer a new jurisdiction on the Courts of Common Pleas. And if we recur to the first member of the section, this view becomes irresistible. They are to hear, in a summary way, upon petition, "all causes cognizable in the said Courts," when the sum does not exceed £20. It is impossible to put any other construction on these words, than that they had relation to cases of which the Court then had jurisdiction, adopting however a new mode of proceeding, corresponding with the proceedings in equity or at law, as the particular circumstances of the case may require.

Independent of this view of the subject, to take cognizance of this case, would be an assumption of an important branch of the jurisdiction of the Courts of Equity, on a forced construction of the act, calculated still more to confuse and confound the jurisdiction of the two Courts, which it is desirable to keep as distinct as possible, and to lead to consequences which are not easily foreseen, and would, probably, in a little time, convert a Judge of the Common Pleas into a commissioner, master, and chancellor.

The motion is refused.

Justices *Nott*, *Colcock*, *Richardson*, *Huger* and *Gantt*. concurred.

Haynesworth, for the motion.

Miller, contra.

THE STATE vs. JAMES S. GUIGNARD, Clerk of Richland Court.

A *Fi. Fa.* and *Ca. Sa.* can both be taken out at the same time and in the same case ; but only one can be executed.

THIS was a rule against the clerk to shew cause why he should not be attached, for refusing to sign and seal both a *Ca. Sa.* and a *Fi. Fa.* which had been presented to him for that purpose, in the case of *Haire vs. Raiford*.

The defendant shewed for cause, that these two executions could not legally exist at the same time, in the same case, and that the defendant was bound to make his election.

The case was tried before Mr. Justice *Gantt*, Spring Term, 1821, for Richland district, who directed the rule to be made absolute.

The present was a motion to reverse that decision, upon the ground that a *Fi. Fa.* and *Ca. Sa.* cannot legally exist at the same time in the same case.

Mr. Justice *Gantt* delivered the opinion of the court.

The law is very clear that a plaintiff may for his own security, take out two writs, but he can execute but one. It is thus settled in the case of *Stamper vs. Hudson*, 8 *Modern*, 303. The same principle is recognized in the case of *Young vs. Taylor and Barron*, 2 *Binney*, 230, where it is said, a plaintiff may take out one execution against the body of a defendant, and another against his goods, at the same time, but both cannot be served.

The Court are of opinion that the circuit decision was correct, and that the motion made to reverse the same should be refused.

Justices *Colcock*, *Nott*, *Johnson*, *Huger* and *Richardson*, concurred.

Gregg, for the motion.

Levy, contra.

STATE vs. PATTERSON.

IT is at the discretion of the Court to continue a case on the part of the State. See *the State vs. Fitch*, 2 Nott & M'Cord, 558.

ADAM DINGLE vs. ROBERT BOWMAN.

Under the act of 1731, upon proof of the loss of the original deed, a certified copy from the registers office, proved and recorded, is good evidence. (*a.*)

THIS was an action of trespass to try titles to land. In tracing the plaintiff's title from the original grantee, he offered in evidence, after proving very satisfactorily the loss and destruction of the original, the copy of a deed from *Vanderhorst and Waring* to *John Miller*, certified by the clerk of the court, who is also register of mesne conveyances, as a true copy from the records in his office.

The admission of this copy in evidence, was resisted on the part of the defendant, on the common law rule, that the witnesses to the original ought to have been produced and examined; as they might possibly be able to state the circumstances attending the execution.

The court so decided; and the plaintiff suffered a nonsuit, with leave to move this court to set it aside.

Mr. Justice *Johnson* delivered the opinion of the Court.

This case was tried by myself; and upon a review of the case, I am satisfied that although the copy was not admissible by the rules of the common law, it was under the act of 1731, (*Pub. Laws* 133,) which was not brought to view on the circuit. That act expressly provides that, "the records of all grants and deeds duly proved before a justice of the peace in the usual method, and recorded, or to be recorded in the registers office of this province; and also the attested copies thereof shall be deemed to be as good evidence in law, and of the same force and effect

as the original would have been if produced, in all the courts of law and equity."

It seems to have been decided, however, that to admit this secondary evidence, proof of the loss of the original was necessary. (1 Bay, 375, 493.)

In this case the proof on this subject was plenary; the motion is therefore granted.

Justices *Nott*, *Colcock*, *Gantt* and *Huger*, concurred.

Miller, for the motion.

Levy, contra.

(a.) The same point was decided during this term, in the case of *Turnipseed vs. Hawkins*. R.



STATE vs. MARY FULLER.

By the 7th section of the second article of our Constitution, the Governor has the power to grant reprieves and pardons, after conviction, except in cases of impeachment, *in such manner, on such terms, and under such restrictions, as he shall think proper.*

And where the Governor pardoned a *feme covert* upon condition that she should leave the state in two weeks, who neglected to go, the Court will consider such pardon as void, after the two weeks, and upon motion of the solicitor will pass sentence upon her.

Laurens district—Spring Term, 1821. Tried before Mr. Justice *Huger*.

THE defendant had been convicted of a misdemeanor, for trading with a slave, and had been afterwards pardoned by the governor, upon the condition of leaving this state in the course of two weeks. But not having complied with the condition required, by actually leaving the state, the solicitor moved that the sentence of the law should be passed upon the said *Mary Fuller*.

To this motion she pleaded in bar, the conditional pardon before noticed; and the presiding Judge entertaining some doubt, whether the pardon, though conditional, was not a good plea in bar, refused to pass the sentence; where-

upon the solicitor now moved to reverse the decision, in order that the sentence might be passed, upon the ground, that as the condition had not been complied with, the pardon was void.

Mr. Justice *Richardson* delivered the opinion of the Court.

The prerogative of pardon is given by the second article, section 7th, of the Constitution, in these words, to-wit :—
“He (the governor,) shall have power to grant reprieves and pardons, after conviction, (except in cases of impeachment,) in such manner and on such terms, and under such restrictions as he shall think proper.” It is difficult to conceive terms more comprehensive than these. The whole power of pardoning, “after conviction,” is given with but one specific exception; and the right of making any restriction is equally unlimited; for the words, “as he shall think proper,” impose literally no qualification of the governor’s power in this respect.

But it is unnecessary to decide whether the governor might require, by way of restriction, an impossible act.—Though even in support of such a construction of the constitution, there would be great reason in saying, that whatever might be the mockery, yet there cannot be a more peremptory denial of the thing required, than to grant it upon an impossible condition. Suppose the governor were to pardon a felon, upon the condition of his procuring some one to be hanged in his stead, would it not be like permitting a traveller to abide in your house, provided he will enter by the key-hole? Both would be considered as synonymous with denial. In such a case, the pardon could exist but by reason of the performance of the condition; for the pardon does not go before, but must follow after the act required. But this view not being indispensable to the decision, no positive opinion is given upon it.

To myself, the most satisfactory construction of this constitutional article is, that the condition to be required

by the governor, should be considered as the substitution of one punishment voluntarily to be inflicted by the convict in lieu of the sentence which had been, or is to be, ordered by the court; and the character of the substitute should be, that in itself, it is capable, physically, of being performed; and be one, not prohibited by the laws of the land. If this be the just construction, it is to be observed that the object is to punish for a crime committed. The law does not regard the breach of contract which may possibly follow from the punishment, nor the possible inconvenience resulting to individuals. As a general rule, for instance, a citizen can not be deprived of his child or his slave; yet either of these may be confined, exiled, or even killed by way of punishment, in derogation of the rights of the parent or master. It was suggested that the defendant being a married woman, cannot leave the state without the permission of her husband; and therefore the condition might require the performance of an unlawful act—the separation of husband and wife. But the condition is not impossible or unlawful in itself; for a married woman may physically and legally leave the state. When a *feme covert* is sentenced to pay money, or to go to gaol, the same objection might be made; for by the doctrine of the domestic relations of husband and wife, she can do neither, without his consent.

A convict having entered into a civil contract, or being in a private economical relation which may render it inconvenient to others, or difficult for himself to comply with a condition, does not render it either impossible or void. The proper character of the condition, which is no more than the substitution of one punishment for another, is, that the condition required, should be *both inconvenient and difficult to be performed*. Suppose a minor under the restriction of parents, an apprentice under the control of his master, or a slave under that of his owner, suppose either of these were pardoned, upon the like condition of leaving the state, it could only follow, that if unwilling, or restrained from leaving the state, the condition prece-

dent and necessary to the operation of the pardon, being unperformed, the pardon could not enure to his benefit.— In the case before us, the fulfilment of the condition which was in itself, capable of being performed, and not forbidden by the law, was prerequisite to the pardon, and that condition having never been performed, the pardon is merely nominal.

The motion is therefore granted.

Justices *Gantt, Johnson, Nott, Colcock* and *Huger*, concurred.

Davis, solicitor, for the motion,
Oneal, contra.



WILLIAM LOVE vs. JAMES M. LOWRY.

A gaoler may maintain a special action on the case for his fees.

Where a remedy under a statute is given, it must be strictly pursued, and it must appear on the face of the proceedings, that the plaintiff's case is such as to authorize him to recover under the act. (*a.*)

To recover against a plaintiff for boarding an insolvent debtor, the gaoler must allege and prove that the prisoner was wholly insolvent and no assignment made, or else that the assets in the hands of the assignee were insufficient. Such an allegation not having been made, the court gave the plaintiff leave to amend.

Sumter, April Term, 1821.

SAMUEL Boatner had been arrested on a *Ca. Sa.* at the suit of the present defendant, and this was a summary process to recover the Gaoler's fees during his confinement. The plaintiff was the Gaoler, and the process contained two counts.

The 1st set forth that the defendant was indebted to the plaintiff \$43 44, "For the board of one *Samuel Boatner*, an insolvent debtor, arrested at the suit of the said *James M. Lowry*, and confined in the gaol of Kershaw district, and was unable to pay the fees thereof, by reason whereof

the said *James* became liable to pay your petitioner the said sum of \$43 44, according to the act of assembly in such case made and provided."

The 2d was a general count for money paid, laid out and expended, for the board of the said *Samuel Boatner*, at the special instance and request of the plaintiff, accompanied by a bill of particulars.

The defendant demurred to the process generally; and on the argument of the demurrer, his counsel insisted on the following grounds:

1st. That the plaintiff had not alleged in his process, that the debtor had refused to pay the fees.

2d. That he had not alleged that assignees were not appointed or that no assets were assigned.

3d. That the action lay in the name of the sheriff and not the gaoler.

The Court overruled the demurrer, and gave judgment for the plaintiff; and a motion was now made to reverse that decision on the grounds taken below.

Mr. Justice *Johnson* delivered the opinion of the Court.

The act of the 18th December, 1817, provides, that in case of the *inability or refusal* of any person confined on mesne or final process to pay the fees, "*then the assignee or assignees of such debtor shall be chargeable therewith, to be paid in the first place out of the effects in their hands; and if the assignee or assignees of such debtor shall not have in their hands as much as may be sufficient to pay the fees aforesaid, then the person, at whose suit the said debtor may have been taken or arrested, shall be liable therefor; and it shall and may be lawful for the person to whom such fees are due and payable, to sue for and recover the same in a special action on the case.*"

The first question which presents itself, (although not the first in the order in which they are set down) is, whether the plaintiff, who was the gaoler, and not the sheriff, can maintain an action in his own name for the fees under this act? I think he may, although he is in contemplation of law the

officer of the sheriff, and in many respects identified with him ; yet in this instance he may have an independent existence, if in truth and in fact, by the terms of his engagement with the sheriff, he is entitled to the fees ; and in the absence of proof, I think it a fair inference that he is, as it is the general usage to allow it, and the action is given to the person to whom, in the language of the act, the fees are due and payable.

The other questions made in the case may be considered in a general view. The rule is, that when a remedy is given by statute, it must be strictly pursued ; and it must appear on the face of the proceedings, that the plaintiff's case is such as to authorize him to recover under the act. The first step required by the act, to enable the plaintiff to recover, is to shew that the debtor is *unable*, or *has refused* to pay the debt. This circumstance is, I think, well alleged in this process. The terms *inability* or *refusal*, are disjoined, and alleging the one, supercedes the other.

In the second place, the assignee is chargeable before the plaintiff, if he have effects in his hands, and it is only in default of this fund that the plaintiff is ultimately chargeable ; and according to the rule laid down, it ought to have appeared on the record, or some form or other, either that the debtor was wholly insolvent, and no assignment made, or that the assets in the hands of the assignee were insufficient. In the process in this case, there is no allegation of these circumstances, or any other from which they can be fairly inferred. The Court are therefore of opinion that the present motion must prevail.

The general count for money paid, laid out, and expended, is liable to the same objection. The bill of particulars is for gaoler's fees, and the circumstances necessary to enable him to recover in the first is necessary in this case. The act requires moreover, that it should be a special action on the case.

The Court are however of opinion, under all the circumstances, and regarding the discretion of the Court in

matters of practice, particularly in this jurisdiction, are of opinion that the plaintiff have leave to amend his process.

The motion is granted.

Justices *Nott*, *Colcock*, *Richardson*, *Huger* and *Gantt*, concurred.

Huntington, for the motion.

Carter, contra.

(a.) Vide, ante, *Lowden vs. Moses*, 120. R.

THE COMMISSIONERS OF THE TREASURY vs. THE SECURITIES OF JOHN N. NEUBY, Sheriff of Abbeville District.

Before the securities of the sheriff can be sued on their bond, a *nulla bona* must have been returned on some *fi. fa.* against the sheriff.

If the sheriff have been sued first, and *nulla bona* returned, then no imparlance will be allowed his securities in the particular case in which such return may have been made.

Tried before Mr. Justice *Huger*, March Term, 1821.

THIS was an action brought upon the sheriff's bond, against his securities. In some other case a judgment had been obtained against the sheriff, execution issued, and returned, *nulla bona*.

Upon this statement, the defendant claimed the right of imparlance, which was refused by the court, in virtue of the act of 1795. (2 *Faust* 10.) The act enacts that, "it shall not be lawful for any person, &c. to commence any action against the security, &c. until a return of *nulla bona* shall have been made on some execution to be issued against the sheriff, &c. *Provided further*, That if the said sheriff should have been first sued after a return of *nulla bona*, the security, &c. shall not be entitled to an imparlance."

Mr. Justice *Richardson* delivered the opinion of the Court.

The construction of the act, though not obvious at first:

right, is plain, upon inspection. The first provision is that before the security shall be sued, in *any case*, the principal shall, in *some case*, have been pursued to insolvency, (the insolvency to be evidenced by a return of *nulla bona*.)

The second is, if the principal shall have been pursued to insolvency in a given case, then the security, if sued, in *that particular case*, shall not be entitled to an imparlance. And the reason arising out of the state of facts comports with the literal distinction between the two provisions.—The former is to prevent a security from being harrassed, while his principal may be solvent, and may himself discharge the claim. The latter is to save the creditor from unnecessary delays, if he should sue the securities after his claim has been made unquestionable and precise, by actual recovery had against the principal; and after the principal has been moreover pursued to insolvency.

The motion is therefore granted:

Justices *Gantt*, *Johnson*, *Nott* and *Colcock*, concurred.

McDuffie, for the motion.

McCraven, contra.

JACOB LORICK *ads.* LEVI RICHARDSON.

Where an attaching creditor gave a bond to the garnishee to indemnify him, for the delivery up of property belonging to the absent debtor, and the garnishee sued on the bond, to which the defendant pleaded performance, the court *Held*, that a replication assigning for breach that another attaching creditor had recovered against the plaintiff a certain sum due by the absent debtor, was a departure and no breach of the bond; and a demurrer to it on that ground was supported.

Newberry—Fall Term, 1820. Tried before Mr. Justice *Gantt*.

THIS was an action of debt, on a bond given by the defendant, an attaching creditor, to the plaintiff's garnishee, to indemnify him against any claims which might be made by the absent debtor, upon him for a note of hand belong-

ing to the debtor, which he the plaintiff gave up to the defendant.

The defendant pleaded performance.

The plaintiff replied, and assigned for breach that *another* attaching creditor had recovered against him a certain sum due by the absent debtor.

To this replication, the defendant demurred; because the breach assigned was no breach of the condition of the bond, and because the replication was no answer to the plea.

The Judge overruled the demurrer; and from that decision the defendant appealed, and moved to reverse it:

1st. Because the breach assigned was no breach of the condition of the bond.

2d. Because the replication was no answer to the plea.

Mr. Justice *Richardson* delivered the opinion of the court.

The only question submitted is, was the replication a departure from the count?

Departure, is, when a replication contains subsequent matter which does not fortify the matter in the declaration. (*Co. Lit.*, 308, b. 1 *Chitty*, 618.)

The count is upon a bond to hold the plaintiff harmless against the claims of a named person; and the replication is, that a different person recovered against the plaintiff. This replication, if true, is yet no breach of the bond, and does not maintain the first allegation, that the defendant was to indemnify the plaintiff against the claims of a specified person. The departure, therefore, is plain, and the motion granted.

Justices *Nott*, *Johnson*, *Colcock* and *Huger*, concurred.

O'Neal, for the motion.

Bauskett, contra.

JAMES McDANIEL et. al. *advs.* THOMAS RICHARDS.

Where the wife was an alien, but had given notice and taken the oath of her intention to become a citizen, but died before she became duly naturalized, the court *Held*, that her husband could not inherit land through her.

The records of admission to naturalization, not mentioning that the person had three years previously declared his intention of becoming a citizen, is not sufficient; because the court will presume that the court which admitted the alien, must have received evidence of that fact at the time, and admitted the party as the law directs.

Pendleton, October Term, 1820. Motion for a new trial, or non-suit. Tried before Mr. Justice *Nott*.

THIS was an action of trespass to try titles to a tract of land, and the principal ground of contest arose upon the naturalization of *Eleanor*, the wife of the defendant, and in whose right he claimed. The court held, that she was not legally naturalized. The defendant then insisted, under the act of Congress of 1802, that he was entitled to hold, notwithstanding *Eleanor* might not have perfected her naturalization, she having died after complying with the first condition of the act, and pursued the terms of the second. On this point, the court charged the jury against the defendant, and a verdict was rendered for the plaintiff.

The defendant moved the Constitutional Court for a new trial, on the following grounds:

1st. Because *Eleanor*, the wife of defendant, was duly naturalized.

2ndly. Because, by the act of Congress of 1802, the defendant was entitled to hold, even though *Eleanor* had not perfected her naturalization.

He also moved for a new trial or non-suit, on the ground, that having proved there was another person, *Adam Richards*, who was nearer of kin to Mr. *Richards*, the intestate, (under whom both parties claimed,) than the plaintiff; and having shewn that he was naturalized, he was entitled in preference to the plaintiffs,

Mr. Justice *Richardson* delivered the opinion of the court.

That the wife of the defendant was not naturalized, has been before decided in this case. Upon a former appeal, (*2 Nott & M'Cord*, 351.)

The first ground, therefore, need not be considered.

In order to understand the second ground, it is necessary to call to mind, that although *Eleanor*, the wife of the defendant, had never been duly naturalized, yet she had, in pursuance of the act of Congress of 1802, given notice of her intention to become a citizen, and had "complied with the first condition specified in the first section" of that act, as introductive to her becoming a citizen; and that her husband, the defendant, had been naturalized before.

It is also necessary to notice, that by the act of Congress of 1804, (*1 Brevard*, 17. *Ingersol's Digest*, 23,) it is enacted that when an alien who shall have complied with the first section of the act of 1802, shall die, before he is actually naturalized, his widow and children shall be considered as citizens, and shall be entitled to all rights, &c. as such, upon taking the oaths prescribed, &c. Under this provision of the act of 1804, it was argued, that *Eleanor*, having given notice, and taking the preliminary oath, her husband, if an alien, would have acquired the right of becoming a citizen without giving notice or taking the same preliminary oath; that is to say, that the words, "widow and children of such alien," may, in such case, mean *husband* and children. But suppose, for a moment, such were the true construction of the act of 1804, which is not the opinion of the court; yet it does not follow that a husband, having so become naturalized, by virtue of the oath of his wife, can inherit through such a wife, seeing that she remained still an alien to the moment of her death. The husband would be still no more than a citizen, attempting to claim a freehold through an alien wife, and still, the freehold having never been in

the wife, because she was always an alien, he cannot claim it through her.

The third ground arises out of the fact, that it appeared that a certain *Adam Richards* is nearer of kin to Mr. — *Richards*, deceased, (the acknowledged freeholder,) then the plaintiff: So that if *Adam Richards* is a naturalized citizen, then the freehold being in him, the plaintiff ought not to have recovered.

Whether *Adam Richards* is a naturalized citizen, remains then to be considered. The record of the supposed naturalization of *Adam Richards*, is as follows, to-wit:

SOUTH-CAROLINA, }
Pendleton district. }

To the Honorable Associate Judges of the said State:

The humble petition of *Adam Richards*, a native of the county of Antrim, in the kingdom of Ireland, arrived in the city of Charleston, on or about the 31st day of May, 1803. That your petitioner is attached to the principles of the Constitution of the United States of America, and is desirous of becoming a citizen thereof, your petitioner therefore prays your honors to admit him to the rights of citizenship, and, as in duty bound, will ever pray.

ADAM RICHARDS, jun.

Be it so,

E. H. BAY,

October 26, 1810.

We do hereby certify that we have known *Adam Richards* since the year 1806; that he has resided within the jurisdiction of this state since that time. That he is of a good moral character, attached to the principles of the constitution of the United States of America, and well disposed to the good order and happiness of the same.

*B. W. Finley,
James Wood,
Samuel Cherry,
John Hall,
David Sloan,
Robert Brackenridge,*

Pendleton, October, 1810.

I certify that I have known the petitioner for six years, and concur in the above certificate.

GEORGE BOWIE,

State of South-Carolina—Pendleton district.

Adam Richards, being duly sworn in open court, makes oath that he has resided in this state since the year 1803, and that he will support the constitution of the U. States, and this State, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly the king of Great-Britain and Ireland, under whose allegiance he was born.

ADAM RICHARDS.

Sworn to, and subscribed in open
court, October 26, 1810.

John T. Lewis, c. c.

The State of South-Carolina—Pendleton district.

In the Court of General Sessions, October 26, 1810.

Adam Richards, a native of the county of Antrim, in the kingdom of Ireland, presented by petition, praying to be admitted to the rights of citizenship in the U. States of America, under the acts of Congress, in such case made and provided; and it appearing to the court *that he is properly admissible thereto* under the acts aforesaid, it is ordered, that the oaths prescribed by the said acts be administered to the petitioner, which was done, and the same subscribed in open court. And the said *Adam Richards* is therefore declared to be duly admitted to the rights and privileges aforesaid, agreeable to the prayer of his petition.

It was argued that it does not appear from these proceedings, that *Adam Richards* ever complied with the first section of the act of 1802, in declaring it was his intention to become a citizen. But it does not follow that such declaration was not duly made. The act does not require that such declaration must be recorded in the court where the alien shall have been finally naturalized. In

fact, the act of 1802 does not expressly require such declaration to be recorded any where.

Again, it was argued that it did not appear that *Adam Richards* had made a report and registry of his name, birth-place, age, nation, &c. before the clerk of some court of record, as is expressly required by the act of 1802, (*Laws U. S. vol. 6, 74.*) But here it is to be observed that such registry, (which the clerk is expressly ordered to record,) need not be made in the court which finally admits the alien to become a citizen. Though it is expressly ordered that a certificate of such registry shall be exhibited to such court as evidence, (says the act) of the arrival of the alien in the United States.

Now, the certificate of naturalization before noticed, and now to be expounded, informs us that it appeared to the court that the said *Adam Richards* was duly admissible to the rights of citizenship, that the oaths prescribed were administered, and the said *Richards* actually admitted to the rights and privileges of citizenship.

The words, "that it appeared that the said *Adam Richards* was duly admissible to the rights of citizenship," pre-suppose that the court was satisfied :

1st. That the said *Adam Richards* had, at least three years before, taken the preliminary oath required by the act of 1802.

2ndly. That he had resided five years in the U. States, and one in this state.

3dly. That he was of good moral character, attached to the Constitution of the United States, and well disposed to the good order and happiness of the same. All which are required by the first section of the act of 1802.

The same words pre-suppose that the said *Adam Richards* exhibited to the court a registry of his name, to be made by some clerk of a court of record, as evidence of the time of the arrival of such alien in the United States, which is required by the second section of the act of 1802.

Supposing integrity and intelligence in the court admitting the alien, we must conclude that satisfactory proofs

of these facts, and the qualification of the applicant, were duly exhibited to the court; and supposing these, the conclusion that the oaths of naturalization were duly administered, and the said *Adam Richards* duly admitted to the rights of citizenship, is irresistible.

A new trial is therefore ordered upon the third ground taken in the brief.

Justices *Johnson* and *Huger*, concurred.

Justice *Colcock* dissented.

Justice *Gantt*: I concur in this opinion, because I think the ground of decision substantially the same as in a former case tried before me, wherein I thought *Eleanor* was proved to have been naturalized.

Bowie & M^r Duffie, for the motion.

Davis & Harrison, contra.



LEVI RICHARDSON vs. JACOB PRESNALL.

The drawer of a note is not bound to refund to the endorser any costs which he may be subjected to in consequence of his endorsement, when he paid off the note as soon as it became due.

THIS was a summary process to recover certain costs, which the plaintiff had been subjected to under the following circumstances:

The defendant had given his note to the plaintiff, who endorsed it to one *Bowers*, before it became due, telling him at the time to push the note when it became due against the drawer, or he, *Richardson*, would not be responsible as endorser.

Bowers called on the drawer to ascertain whether punctuality in payment might be expected when the note became due. The drawer, *Presnall*, said he could not tell whether he should be able to pay it or not, and to stop *Richardson*, if he could. *Richardson*, the endorser, had sold his land, and had informed *Bowers*, the endorsee, that he was going away.

Bewers, on receiving the answer he did from the drawer of the note, obtained a *ne exeat* against *Richardson*, to prevent his leaving the state; and for the costs which he was put to on account of this proceeding, the present suit was brought against the defendant, although the note had been punctually paid off by him when it became due.

The case was tried before Mr. Justice *Gantt*, Spring Term of 1821, for Newberry district, who, thinking that the defendant was not bound to refund those costs under existing circumstances, non-suited the plaintiff.

This was therefore a motion to set aside the non-suit, and for a new trial :

1st. Because the defendant, as maker of the note, was liable to the plaintiff for all costs which he sustained in consequence of having endorsed the note.

2nd. Because, under the particular circumstances of this case, the plaintiff was entitled to a decree.

Mr. Justice *Gantt* delivered the opinion of the court.

The drawer of the note was certainly not bound to refund to the endorser the costs which he was subjected to pay as a consequence of his endorsement. It was a transaction of his own which the defendant could not hinder.—As drawer of the note, the defendant was bound to pay the amount to the legal owner of it when it became due, and this was the only responsibility which could attach where no default in payment was made.

The endorser who was as a new drawer to the endorsee was equally bound by law to pay, on the default of the drawer; and as he had informed the endorsee of his intention to go away, that circumstance occasioned the steps which the endorsee pursued against him. He cannot saddle the drawer with these costs. It would be equally against justice, as it certainly is against law, to attempt it.

The court are unanimous in their opinion that the deci-

sion below was correct, and that the present motion should fail.

Justices *Colcock, Johnson, Richardson* and *Huger*, concurred.

Bauskett, for the motion.

O'Neal, contra.



WILLIAM SCOTT vs. SAMUEL WILSON.

By the act of 1796, regulating sheriff sales, and generally called, the *ten per cent. law*, if the plaintiff desire and direct the sheriff by a *notice in writing*, in time to enable him to insert it in one of his advertisements, the purchaser of property, immediately after it is knocked off, may be required to pay *ten per cent.* on the purchase. And if he fail or neglect to make such payment, the sheriff is bound to set the same property up for sale upon the spot; and upon the resale, the sheriff is forbidden to receive the bid of the former purchaser.

When the plaintiff demands and receives the ten per cent. the sheriff cannot immediately resell, but when he does not, the property may be re-sold, even on the same day, *ad infinitum*, if the terms be not complied with.

Whether the ten per cent. is to be received or not, is entirely at the desire and direction of the *plaintiff*: When it is not required, the law stands as before the act.

Richland, March Term, 1821.

THIS was a rule against *Eli Kennerly*, Esq. late sheriff of Richland district, to shew cause why he should not be attached, for not collecting the amount of a *fi. fa.* lodged in his office in this case.

He shewed for cause that he had levied on the defendant's property, and advertised the same for sale, with notice that ten per cent. would be demanded of the purchaser, if the terms of sale were not complied with; that the property was bid off, and the purchaser paid the ten per cent. but refused further to comply with the terms. He admitted that although he was required by the plaintiff to resell the property, and that although notice had been given to re-

sell, if the terms were not complied with, he did refuse to resell on that day and the day after.

The presiding Judge, after hearing the case, discharged the rule; and a motion was now made to reverse that decision, on the ground that it was the duty of the sheriff to resell immediately, if the terms of the sale were not complied with.

Mr. Justice *Johnson* delivered the opinion of the Court.

The acts of the legislature, regulating sheriffs sales of property taken in execution, are themselves involved in some obscurity; and the contrariety of usage under them in different parts of the state, has been productive of still greater confusion; and in some of the districts the lodgment of an execution in the sheriff's office, is in practice, but the incipient stage of the troubles which attend a lawsuit. For the plaintiff to dance attendance on the sheriff from sale day to sale day, and from time to time, and obtaining rule after rule against him, is seen almost every day; and in the event of his ultimately obtaining an attachment against him for neglect of duty, it is not unusual to see it placed in the hands of a Coroner, who is perhaps his deputy or gaoler. And one case has occurred, within my own knowledge, where an attachment was granted against the coroner for not doing his duty, on an execution against the sheriff, and another against the sheriff for not attaching the coroner. In this situation, they bid defiance to law, as there was no one to execute its process; and this farce was played off for several years to the great prejudice of honest creditors. To reduce order out of this state of things, is a matter of some difficulty; and I fear the court want the power, in some respects, to do so; but it is of the utmost importance that the court should promptly settle, as far as they can, all the questions which arise out of it.

The act most directly applicable to the question arising out of this case, is that of 1796, entitled, "An act, to prevent debtors from purchasing, repeatedly, their own pro-

perty at sheriffs's sales ; and for the better regulation of sheriffs and other sales at auction." The substantial provisions of it are, that every purchaser at sheriff's sales, shall, if the plaintiff *desire and direct* the same, (of which the plaintiff must give the sheriff *notice in writing*, in time to enable him to insert such notice in one of his advertisements,) immediately after any article of property is knocked off to him, pay into the hands of the sheriff, a sum which shall be equal at least to ten per cent. upon the amount of his purchase ; and if he should fail or neglect to make such payment, the sheriff shall immediately set up the same property for sale upon the spot ; and upon the resale, the sheriff is forbidden to receive the bid of the first purchaser. And " if any purchaser, after paying the per centage aforesaid, shall fail or neglect to comply with the terms of the sale, all the money so paid shall be forfeited to the plaintiff in the execution, under which such sale was made," which is to be applied first to the payment of the costs, and the surplus, if any, to the debt. (*2 Brevard, 218, 219.*)

On the construction of this act, it is contended that the immediate payment of the ten per cent. required by the act, was intended as a security in the first instance, that the purchaser would comply with the terms of the sale ; and secondly, that it should operate as a penalty upon him in the event of his refusing to do so ; and raises a strong presumption that it was not contemplated by the act to require him to pay the whole purchase money immediately on demand, and gave to the purchaser further time to comply with the terms. There are, however, strong reasons opposed to this construction. I cannot believe, nor can I collect it from the act, that the legislature ever intended to protract the payment of judgments by payments in instalments of ten per cent. from sale day to sale day. The occasion which gave rise to it is expressed in the title of the act, and is familiar to all my brethren ; and the very mischief which it was intended to prevent, will be legalized by this construction. The provision, that the first purcha-

ser's bid shall not be again received, imposes no restraint. If the defendant can muster ten friends on those occasions, which he may always do with ten per cent. in his pocket, he gains time and loses nothing. By the very terms of the act, it is to be applied, first to the payment of the costs, and then the debt. The act, as I have before remarked, does not postpone the time at which the property is to be resold; and I think we ought not to do so by construction. In this respect therefore, the law ought to stand precisely as it was before. Here I am met with the act usually called the vendue act. This act provides that "every person who shall purchase any lands, slaves, houses, horses, cattle, ships, boats or other vessels, goods, wares and merchandize, at any public sale in this state, and which purchase shall be entered on the books of the vendue-master, so selling such property, such person refusing to comply with the condition of the said sale, *within seven days thereafter*, shall be liable to all losses thereon to the original owner." And for the more speedy ascertaining said losses, the vendue-masters are authorized to resell, after giving seven days notice. This act, it is contended, allows the purchaser seven days at least to comply with the terms of the same.

If I were now left for the first time to put a construction on this act, the first answer I would give to it would be, that it has no relation to sheriff's sales. On looking into the whole act, it most obviously appears that the avowed object of it was to regulate sales by vendue-masters, and not sheriffs. This is admitted; but it is said that the principles of the act have, in usage and the decisions of the courts, been constantly applied to sheriff's sales; and if this be so, it would be inexcusable to controvert its correctness; nor do I think it necessary to the present occasion. This act does not forbid an immediate resale, and makes the seven days notice necessary only to charge the first purchaser. There must be a reciprocity in every legal contract, and if the purchaser has a right to seven days to determine whether he will or will not comply with the

terms, the seller, or to use the terms of the act, the original owner may recede from it, and consequently may resell immediately, if he chose. No wrong is done to the purchaser, and the only effect is, that the seller loses his remedy against him for any losses which may be sustained. Upon the whole, it appears to me that sheriff's and other public sales are precisely upon the same footing of all other contracts for the sale of property, unless when they are regulated by positive law, and then the law makes the contract for them, with the terms of which the parties are bound to comply.

Let us then apply these principles to the present case.— In the absence of positive law, neither would be bound by a sale at vendue, until the thing sold was delivered and accepted.

The vendue act, however, binds the purchaser for all losses which may be sustained, if he fail to comply with the terms of the sale, and the mode of ascertaining that loss is pointed out. The act of 1796, first quoted, usually called the ten per cent. law, however, authorized the plaintiff to demand ten per cent. and if it be not paid, he may resell immediately, and the mode in which that demand is to be made, is pointed out; and these acts, taken together, constitute what I regard as the conditions of the contract between the parties.

If the plaintiff, therefore, demand and receive the 10 per cent. in the manner prescribed by the act, the purchaser has complied with the condition of the contract between them, and nothing more can be required of him, unless he choose to comply fully with the purchase, and for this the vendue act gives him time. If the ten per cent. is not demanded, the law stood as before that act. If the seller thought proper, he might charge the purchaser with any loss which he may sustain, or if he choose, he might, on the general principle of law, regard it as at an end, and resell immediately. The purchaser could not complain; he has complied with his contract; and no one can take advantage of his own wrong. It is objected,

however, that the defendant in the execution might sustain an injury in consequence of a prompt resale. I think not. All that he can require is, that his property should be regularly advertised, and sold on a regular sale day, and within the hours of sale. The bid of a person not intending to comply with the terms of the sale, gives it a fictitious value; and it ought to be recollected that these subterfuges are most frequently resorted to by defendants. Indeed it very rarely happens otherwise. If, however, a case should occur, in which a defendant was really injured by the improper conduct of a person purchasing and refusing to comply with the terms of the sale, I should incline to think that he might recover the loss in an action against him.

This view of the case leads to the conclusion that when the plaintiff demands and receives the ten per cent. the sheriff cannot immediately resell. But where he does not, the property may be resold even on the same day *ad infinitum*, if the terms be not complied with.

The plaintiff demanded and received the ten per cent. in this case; the rule was therefore properly dismissed.

Justices *Nott*, *Gantt* and *Huger*, concurred.

Gregg, for the motion.

Goodwyn, contra.

L. P. POOLE vs. MUSE TOLLESON.

Where a note is endorsed after it becomes due, demand must be made of the drawer, and notice of non-payment must be given to the endorser, to make him liable. (c.)

THE plaintiff was the endorsee of a promissory note, endorsed by the defendant, after the note had become due. The plaintiff demanded payment of the maker of the note; but without giving notice of his refusal to pay, commenced this action against the endorser. And the presiding Judge (*Huger*,) holding that the notice of a refusal to pay was

unessential, in such a case, gave a decree for the plaintiff. Whereupon the defendant moved this court to reverse the decree, and for a non-suit upon the ground, that not only a demand upon the maker should have been made, but notice of his failure to pay, ought to have been given to the defendant.

Mr. Justice *Richardson* delivered the opinion of the court.

It has been already decided by this court, in the case of *Esfert vs. Descoudres & Co.* - (1 Cons. Rep. 70.) That in order to render the endorser liable, a demand of payment must be made upon the maker of a note, *though endorsed after it has become due.*

But the Judges do not, in that case, say, in so many words, *that notice to the endorser*, in case of a refusal to pay by the maker, is also indispensable; yet it seems implied that notice is necessary.

In the case of *Berry vs. Robinson*, (*Johnson* 121,) the Judges of the Supreme Court of New-York unanimously decided the same point, and in their opinion, say, "the plaintiff was properly non-suited, for not proving demand of payment on the maker, and notice of his default to the endorser." But in that case too, the want of notice was coupled with the want of a demand of payment upon the maker. No notice or demand of payment had been made in either of those cases; and I have found no adjudged case, in which, (as in the one before us,) the want of notice was uncoupled with the want of demand of payment. In the case before us there had been a demand and refusal, but no notice.

Thus we are without an express adjudication upon the precise point; yet the treatises upon bills of exchange and promissory notes make no distinction in this respect, between notes endorsed before and after they become due.—Thus *Schwyn* says, (vol. 1, p. 407,) "where a note, &c. is endorsed, &c. it is necessary in an action against the endor-

ser to allege and prove a demand on the maker, and notice of his default, &c."

And I believe all the books of acknowledged authority lay down the same general rule as established; and adjudged cases seem to justify their general language; (5 Term. 513. 1 Salk. 124. *Tobey vs. Barber*, 5 John. 73. 6 Term 52.) though they have not expressly decided it.

Chitty says, (151,) if a bill be presented and acceptance be refused, notice should be given as soon as possible to the persons to whom the holder means to resort for payment, or they will, in general, be totally discharged; for in contemplation of law, the drawer has lost his effects in the hands of the drawee; and it is on that principle that notice of non-payment is required.

In the case of *Blesard vs. Hirst*. 5, Burr. 2670, it was decided, that even where it is not necessary that the bill should be presented for acceptance before it became due, yet if it be presented, the holder must give immediate notice in case of non-acceptance. (See also *Goodall vs. Dolly*, 1 Term. Rep. 712, for same point.

From the general rule then, and the plain inference from adjudged cases too, it seems to follow, that when in any case, a demand of the drawee is required, then notice, if the bill has been dishonored, seems to follow as a necessary consequence; and, as an indispensable one, before the drawer becomes fixed in his liability. If so, the case of *Effert vs. Des Coudres*, has settled the question before us. If it be asked when notice is to be given, I can only answer, that in my individual judgment, immediate notice is as much required in such a case as in any other. Not only simplicity and uniformity require that the same rule should prevail, but there is the same force of reason and necessity in the one case as the other, whether we argue from the letter, the allowed import of the contract, or from the consequences which may follow; for what is the note when due, but an acknowledgment of so much in hand belonging to the payee? What is the endorsement but a bill to pay such amount to the endorsee upon de-

mand? What is the implied assurance on the part of the endorser but that so much money, subject to his disposition, is still in the hands of the maker, notwithstanding the time of payment is passed.

If notice of the non-payment upon the demand made by the endorsee, be not received, what must the endorser conclude but that his money has been disposed of according to order; and if he be kept ignorant of the refusal to pay, may he not be put to the same hazard of loss, and is he not lulled into the same security as other drawers who receive no notice? Surely he is in the same situation. The holder may suspect that he is not to trust to the maker's punctuality, but the endorser assures him he has still only to demand the money; and if the holder accepts the endorsement or bill, he is in the situation of other holders.

The error appears to me to arise from supposing the endorsement to mean that the maker is to pay according to the tenor of the note, which is impossible; because the time of payment is already past; whereas the meaning of the endorsement is to pay the amount acknowledged to be due, when called for thereafter by the endorsee.

In a word, the endorsement is as a new bill, and the holder looks at the note but to ascertain the amount, and to shew that it has been already accepted.

It is as if a bill were upon a factor for all the money he has in hand; resort must be had to his books, or any acknowledgment by him to ascertain the amount due; but the bill itself is, in other respects, like every other bill which is payable on demand.

The motion is granted.

Justices Colcock and Gantt, concurred.

Justice Johnson: I dissent. I agree that notice was necessary, but with regard to the time at which it must be given, it may be done at any time before action was

brought, and I think the acceptance of the service of the process authorized the presumption of notice.

Justice *Nott* concurred with Justice *Johnson*.

Gist & *Roddy*, for the motion.

M^r Kibbin, contra.

(a.) See *Course & M^r Farlane vs. Adm^r of Shackleford*, 2 *Nott & M^r Cerd*, 283. R.

JOSIAH M. ATKINSON vs. JAMES HARTLEY.

In an action of slander, where the witnesses were doubtful whether the words spoken were, "you are a damned mulatto son of a bitch," or "you are a damned mulatto *looking* son of a bitch," and the words laid were, "you are a damned mulatto son of a bitch," the court *Held*, that the words proved did not support the plaintiff's declaration; although at the time of uttering the words, the defendant, after the witnesses were called upon by the plaintiff to take notice of what he said, repeated, "I never eat my words; if you are not a mulatto, your looks belie you."

Sumter, March Term, 1821.

THIS was an action of slander. The declaration contained two counts. The words charged in the first were, "you are a damned mulatto son of a bitch." Those in the second were, "you are a mulatto son of a bitch."

Two witnesses, examined by commission on the part of the plaintiff, stated, that in a quarrel between the parties, where both were much excited, and when, as it was supposed, the plaintiff had gone into the house to get a gun to fire on the defendant's son, he said to him, bring out your gun and shoot, "you *damned mulatto son of a bitch*, or you *damned mulatto looking son of a bitch*;" but which of these expressions was used, the witnesses could not say. One of them stated further, that when the defendant used the expression, the plaintiff called to them to take notice that the defendant called him *a mulatto*; to which defendant replied, "I never eat my words, and you may digest them

as you can. If you are not a mulatto, your looks belie you damnably."

The jury, contrary to the opinion of the court, found a verdict for the plaintiff for \$500 damages.

A motion was now made for a new trial, on the following grounds:

1st. Because the words proved did not support the plaintiff's declaration.

2d. Because they were spoken in the heat of passion.

3d. Because the damages were excessive.

Mr. Justice *Johnson* delivered the opinion of the court.

It has not been denied that the words laid in the declaration are actionable. This court has frequently so decided. (*See Eden vs. Legare*, 1 Bay, 171. *Wood vs. King*, 1 Nott & M.Cord, 185.)

And it is not only incumbent on the plaintiff to set out a good case on his record, but he must prove it, at least substantially. (2 *Schwyn N. P.* 1168.)

In relation to the first ground in the brief, it is only necessary then to enquire, whether the words proved do support the declaration?

To render words actionable, they must be spoken affirmatively, and import a direct charge. (2 *Esp. Dig.* 100. *Starkie*, 72. *Van Ransselaer vs. Dole*, 1 *Johnson's Cases*, 279.) It follows, therefore, that those that are equivocal or spoken adjectively, are not so. (6 *Bacon*, 237, 240. 2 *Esp. Dig.* 99.) Now the words proved in this case are, that the defendant said to the plaintiff, you are a mulatto, or you are a mulatto looking son of a bitch. Take the first, and they impute a direct legal charge; but take the latter, and in a legal point of view they are inoffensive; and which of these were used, the witnesses are unable to state. The plaintiff has not, therefore, *proved* his case; and the jury have founded their verdict on the conjecture that the first were used, without any evidence to authorize it.

It has been contended, in opposition to the present mo-

tion, that the defendant's reply to the request of the plaintiff, that the witnesses should take notice that the defendant called him *a mulatto*, was an avowal of that charge, and resolves the doubt as to the words first spoken. I think not. They are involved in the same doubt and uncertainty, and I am inclined to think would bear a different construction. "I never eat my words, if you are not a mulatto, your looks belie you." The first member of this sentence would seem to be an avowal of the fact charged by the plaintiff, but the explanation given in the last, repels the idea. The plainest exposition which can be given to the whole, taken together, is, "I said you looked like a mulatto, and I think so still."

This view of the case supercedes the necessity of considering the other grounds. I will, however, remark as to the second, that actions for words spoken in heat, ought not to be encouraged; although in a legal point of view passion is only a circumstance to repel the presumption of malice, which is the very basis of the action of slander.—(2 *Schwyn*, N. P. 1156.) And where it appears to the satisfaction of a jury that they were unpremeditated, and spring involuntarily out of a burst of passion, they ought never to find damages.

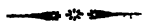
The motion is granted.

Justices *Nott*, *Colcock* and *Huger*, concurred.

Justices *Richardson* and *Gantt*, dissented.

Miller, for the motion.

W. F. De Saussure & *Holmes*, contra.



The Administrators of WM. PORTER vs. JOHN KENNY.

Where the parties go to trial with the proceedings in an unfinished state, the party in default shall not be permitted to take advantage of it.—Whatever is alleged on one side, and not denied on the other, shall be taken as true.

THIS was an action of assumpsit, on a promissory note, tried at Columbia, Spring Term, 1821.

The defendant pleaded that he had not promised to pay within four years. The defendant in his replication set out a promise on a particular day, and that within four years from that day, his intestate had commenced an action which had been continued from time to time, until a particular day, when the action abated by the death of the plaintiff, and that this action had been commenced within a year from that time. Here the pleadings ended.

In that imperfect state of the pleadings, the parties went to trial, and a verdict was found for the defendant.

This was a motion for a new trial, on the ground that the verdict was contrary to law and evidence.

Mr. Justice *Nott* delivered the opinion of the court.

If the judge who presided in this case had known the state of the pleadings, the probability is that he would not have suffered the parties to have gone to trial. But after verdict, we must take the case as we find it, and determine it according to the statement of facts which it presents.—As the defendant has not denied the plaintiff's replication, it must be taken as true. We must presume every thing against the party who refuses or neglects to put in his plea, otherwise he would derive an advantage from his own wrong, which is not to be allowed.

A new trial must be granted.

Justices *Colcock*, *Johnson*, *Richardson* and *Huger*, concurred.

Miller, for the motion.

W. F. De Saussure, contra.

ANTHONEY HANEY vs. JOHN TOWNSEND.

Case as well as trespass *vi et armis* is a proper action for criminal conversation.

A variance between the writ and declaration cannot be taken advantage of on a motion to arrest judgment.

Pendleton, March Term, 1821. Tried before Mr. Justice Huger.

THIS was a special action on the case for criminal conversation with the plaintiff's wife, without any *ac etiam* clause in the writ.

The declaration contained a count for harboring the plaintiff's wife, as well as for criminal conversation.

The plea was the general issue.

After a verdict for the plaintiff, the defendant moved in arrest of judgment upon several grounds, of which the following only require to be considered, viz :

1st. Because an action on the case is not the proper form of action for criminal conversation ; *trespass* being the usual and only proper form of action.

2d. Because a count for harboring the wife ought not to be joined with one for criminal conversation, the writ being no more than *case for criminal conversation alone*.

Mr. Justice *Richardson* delivered the opinion of the court.

There is no doubt that *trespass* is a proper form of action for the injury done by seducing a wife. (1 *Selwyn*, 11. 5 Term. 402.) But, however unusual in practice, there is little reason in saying, that case also is not competent to be brought.

To suppose the injury invariably done with force, is neither true nor characteristic of the act charged ; for though a misdeed, no direct force is employed ; but the injury consists in the alienation of the affections of the wife, and the corruption of her morals. The mortification of mind, the consequent depression of the husband's happiness, and the loss of her society, are the positive evils.

Besides, the proper adaptation of this form of action to the true character of the injury, there are not wanting the opinions of writers, nor the expressions of Judges to au-

thorize the conclusion; that case is a proper form of action. (6 *East*, 251, 387, 389, 391. 1 *Chitty*, 264. 1 *Tidd*, 6. *Boss. & Pull.* 474.)

But supposing case the proper form of action, it was argued that a count for harboring cannot be joined; inasmuch as the writ was expressly for *criminal conversation*, and no more.

Admitting this position to be correct; yet a variance or departure in the count from the writ must be pleaded. (1 *Chitty*, 623. 2 *Saund.* 34. 2 *Wil.* 96. 1 *Saund.* 117, n. 3.) Advantage cannot be taken of it under the general issue.—Now both these counts are in case, and in themselves they may be joined; as both require the same plea and judgment, which are the true tests, whether counts are compatible. (*Willes*, 120. 1 *Term. Rep.* 274. 1 *Lord Ray.* 272. Even where the defendant pleads a general demurrer to a declaration in which there are different counts which may be joined, if one count be good, judgment must be given for the plaintiff. (1 *Wil.* 248. 5 *Com. Dig.* 474. *New Rep.* 43. 6 *East*, 333.)

In the case before us, both counts are good and may be joined, though one varies from the writ. This should have been pointed out by a special plea, which would have left the other counts good and consistent with the writ.—As they are, each is good, and the two may be joined.

There can therefore be no ground to arrest the judgment, though the defendant might have got rid of one count, by pleading the variance from the writ.

There was a ground taken in the brief, that a count in *trespass* had been joined to case, but this was a mistake, in fact. Such counts could not have been joined. (1 *Chitty*, 199.) There was also a motion for a new trial, but this was given up as untenable.

The motion is therefore dismissed.

Justices *Colcock*, *Nott*, *Johnson*, *Gantt* and *Huger*, concurred.

Davis, for the motion.

M^r Duffie, contra.

ELIZABETH FALCONER vs. WILLIAM GARRISON.

If a person agree to sell land for so much per acre, and afterwards execute titles for the same, by metes and bounds, be it *more or less*, and take a note for the purchase money, if it turn out afterwards that there is a greater number of acres than was contemplated, the seller shall not recover payment for the overplus. The verbal agreement is merged in the written contract, and parol evidence cannot be admitted to prove any contract different from the written agreement.

Tried at York, Spring Term, 1821, before Mr. Justice
Nott.

THE plaintiff in this case had agreed, verbally, to sell to the defendant three or four small tracts of land adjoining each other, at a stipulated price per acre.

A surveyor was appointed by the parties to ascertain the quantity of land. He made a survey and returned a plat, with a description of the land by metes and bounds, estimating *it at one hundred and twenty acres, more or less*. The plaintiff then entered into a covenant, by which she agreed in consideration of a certain sum therein mentioned, to make the defendant titles to one hundred and twenty acres of land, according to the plat aforesaid. And the defendant gave a note for the purchase money. It appeared afterwards that the land had not been accurately surveyed, but contained a few acres more than the surveyor had supposed. The defendant, however, expressed herself satisfied with it, and about six years afterwards, when the purchase money was paid, she executed titles according to the terms of her covenant. After all this was done, she commenced an action to recover the value of the surplus land which she had conveyed to the defendant.

The presiding Judge instructed the jury that the first contract was merged in the covenant afterwards entered into. That they must therefore look to that contract, and the deed afterwards executed, for the intention of the parties. By the covenant, as also the title deed, she had sold an hundred and twenty acres for a specific sum, (and not so much per acre,) according to the plat referred to, which

represented the land to contain one hundred and twenty acres, *more or less*. It was to be presumed therefore that she intended to convey all the land represented by that plat, whatever the number of acres might be, and she was not entitled to recover for any surplus land which it might be found to contain.

The jury found for the defendant, and this was a motion for a new trial, on the ground of misdirection in the judge, and also because the verdict was contrary to the evidence.

Mr. Justice *Nott* delivered the opinion of the court.

The only question in this case is, whether the directions of the court to the jury were correct. For, if the instructions to the jury were proper, their verdict, which was in conformity with those instructions, cannot be wrong.

The circumstances of this case are in no respect different from those of cases which daily occur in our courts. It is not unusual, on a resurvey of land, to find a large surplus over and above what was contemplated by the parties at the time of the sale. Yet I have never known an action brought before to recover payment for such surplus. This, indeed, is stronger against the plaintiff than cases of this description usually are; because she was aware of the fact when she made the deed. It is not improbable that the written agreement was varied from the original verbal contract for the purpose of preventing any further investigation. If we look to the written agreement alone, or to the title deed, there is nothing to induce a belief that any regard was had to the number of acres. It would be attended with the most dangerous consequences to permit a bargain which had been closed by the most solemn acts known to the law to be set afloat by the preliminary conversation which led to the contract; and particularly, six years after it had been so closed, and after every part of it had been carried into complete execution.

The motion therefore must be refused.

Justices *Richardson, Colcock, Johnson, Gantt and Hunger*, concurred.

Williams, for the motion.

Gist, contra.



THOMAS P. YOUNG vs. SIMON P. GREY.

A variance between the writ and declaration may be taken advantage of by a special demurrer. (a.)

THE plaintiff had issued a writ in case, and declared in covenant. The defendant put in a special demurrer, and assigned for cause the variance between the writ and declaration. The Judge on the circuit overruled the demurrer. This was a motion to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the court.

There are two questions submitted to the consideration of the court in this case :

1st. Whether the variance between the writ and declaration is fatal to the plaintiff's action ?

2d. Whether the defendant can take advantage of it by special demurrer ?

The practice of our courts is now so well established that it is unnecessary to trace up the English practice through all the legal fictions and changes which it has undergone to ascertain what it now is. And with the press of business under which we are laboring, we have no time to devote to fruitless and unprofitable research. I would, however, observe, that in *Chitty on Pleading*, it is said that "at a very early period, specific forms of action were provided for such injuries as had then most usually occurred ;" and that "when a prescribed form is found in the register, the proceedings should not materially vary from it, unless in those cases where another form of action has long been sanctioned by usage ; for the courts consider it of the

greatest importance to observe the boundaries of the different actions, not only in respect of their being most logically framed, and best adapted to the nature of each particular case ; but also, in order that causes may not be brought into court confusedly and immethodically, and that the record may at once clearly ascertain the matter in dispute.— (1 *Chitty*, 85, 86.) And again, the same author says, the first requisites of a declaration are, “ that it correspond with the process.” (*Do.* 247-8.) And Judge *Blackstone* defines a declaration to be “ an amplification or exposition of the original writ.” (Vpl. 3, 393.) *Chitty*, however, says, that the proceedings will not be set aside merely on account of a variance in the cause of action, and therefore the only consequence of the mistake is, that the plaintiff loses the security of the bail. But this does appear to me so inconsistent with the reason and philosophy of the law as before laid down, that I am glad the long established and uniform practice of our courts will not now permit us to follow it. It has always been the practice to set out the general nature of the writ in the declaration, and any substantial variance has always been held fatal.— The various acts of the legislature regulating the proceedings of our courts, would now render any other practice inconvenient and impracticable.

I believe the most usual way has been to take advantage of the error by pleading the variance in abatement. But I still think the demurrer may be supported. Formerly when the whole writ was set out in the declaration, the defendant might take advantage of a variance between them, by motion in arrest of judgment, writ of error, plea in abatement or demurrer. But since the practice is introduced of only setting out the substance of the writ in the declaration, if the party will take advantage of such a variance he must crave oyer of the writ, and shew it to the court.— (*Hole vs. Finch*, 2 *Wilson*, 393.) But the writ here spoken of, is what in England is called the original writ, which is not in the law court, but remains in the Court of Chancery, from whence it issued. The *capias*, which is

our original process, is a mesne process, of which he can not crave oyer in England, and which is considered at an end as soon as the defendant appears, and is in court. (2 *Wilson*, 393-4-5. *Cro. Eliz.* 185, 198, 829.) Here he is under no necessity to crave oyer of the writ, for the purpose of exhibiting it to the court; because it is already in court, and constitutes a part of the record. He need not do it for the purpose of discovering the variance, because the plaintiff is bound to furnish him with a true copy when the writ is served. The only case which occurs to me in which he is under the necessity of craving oyer of the writ is, when he wishes to shew a variance between the original and the copy, and then he is entitled to it. Indeed, I have no doubt that he may, if he please, according to the practice of our courts, crave oyer of the writ at any time, and for any purpose, before he has appeared to the action, or even before he has pleaded to the declaration.

The motion is granted.

Justices *Johnson*, *Richardson* and *Huger*, concurred.

Bauskett, for the motion.

O'Neal, contra.

(a.) See *Ante*, *Haney vs. Townsend*.—206 R.

DAVIS & FANT, Executors of WEBB, vs. FLEMMING
DUNCAN.

It is not necessary in order to maintain an action of trover, that a demand and refusal should be proved where the taking has been tortious.

Lending a negro to a son-in-law, and permitting it to go home with a daughter when she goes to house-keeping, will not be construed into a gift when it has not been accepted and kept by him.

THIS was an action of Trover for a negro woman, tried at Winnsborough, Spring Term, 1821.

It appeared in evidence that the defendant's wife was

the daughter of the plaintiff's testator. She had been married to a former husband, and when she first went to keep-
ing house, her father *lent* her this negro girl; but the husband sent her back, and refused to accept of her upon such terms. He sent her a second time, and the husband returned her again. The father then kept her until his daughter had a child. He then sent her to attend upon her during her confinement. Her husband died shortly after, when she returned to her father's house, and continued to live with him as one of his family, until her marriage with the defendant. He still continued to live with his father-in-law three or four months before he went to house keeping. He left the house of his father-in-law when he was from home, and took this negro woman with him. The overseer, under whose charge she was, forbid him to take her. He, nevertheless, tied her, and took her away. The father-in-law died within a few weeks afterwards, leaving the plaintiffs his executors. They made a demand of the negro, and the defendant refusing to deliver her up, this action was commenced. The witness who proved the demand was unable to ascertain the day, so that it was left doubtful whether it was before or after the commencement of the action.

The counsel for defendant moved for a non-suit, on the ground that the plaintiffs had not proved any demand before they commenced their action. The motion was overruled, and the jury found a verdict for the plaintiffs.

A motion was now made for a non-suit, on the ground above stated, and also for a new trial, on the ground that the verdict was contrary to evidence.

Mr. Justice *Nott* delivered the opinion of the court.

If the only evidence of conversion in this case had been the refusal to deliver up the property when demanded, the motion for a non-suit would have been entitled to some consideration. But a demand is not necessary when the taking is tortious and unlawful. The manner of taking

the property in this case, furnished sufficient evidence of a conversion to authorize the plaintiffs to maintain an action.

The motion for a non-suit therefore, cannot prevail.

The decisions which have so long prevailed in this state, that permitting property to go into the possession of a son or daughter, upon their marriage, and continuing with them, should be construed into a gift, is not to be controverted. And even when it is originally expressed to be a loan, it may, by lapse of time, be considered as having ripened into an absolute gift. But then there must be a continued possession, accompanied with continued acts of ownership. If the first husband had accepted of the property, and kept it during his life, it might perhaps have admitted of that construction. But he refused to accept it, and never had the possession, except on one occasion, and that for a temporary purpose. The present defendant never pretended to any right in himself.

The motion for a new trial, must therefore be refused.

Justices *Colcock, Johnson, Richardson, Huger* and *Gantt*, concurred.

Bausket, for the motion.

O'Neal, contra.

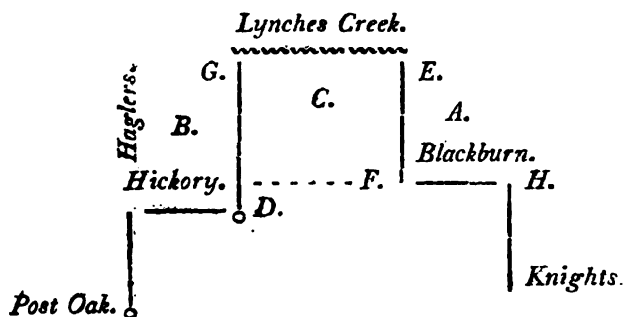
JOHN WELCH vs. ELIJAH PHILLIPS.

In ascertaining the metes and bounds of lands, natural objects or artificial marks should generally govern; where they cannot be ascertained, course and distance must prevail; where neither can be ascertained, the plaintiff can only recover the number of acres purchased; and all may be resorted to in aid of each other. (*a.*)

Tried at Lancaster, Spring Term, 1821.

THIS was an action of trespass to try titles to a tract of land, containing thirty-nine acres, being that part represented by the letter C. in the plat hereunto annexed. The plaintiff claimed under a large grant which covered the land in dispute, and all the adjacent land for a considera-

ble extent. *Hagler's* and *Blackburn's* lands, which are represented by A. and B. were embraced by older grants, and therefore took a preference to the grant under which the plaintiff claimed. The defendant had purchased from one *Cagle*, who had derived his title from the plaintiff.— His deed described the land as containing "five hundred acres, beginning at a post oak corner of *Boston Hughes*, running west along *W. Maners* line thereon to Turkey-creek, thence up Turkey-creek to the fork, to an ash corner, thence running up the South Fork of said branch to *Bird's* branch, to a red oak station of *Andrew Arlets*, thence to a black jack corner, thence along a row of marked trees to *Sawscuffle-branch*, down the branch to *Knight's* line, along said line to *Blackburn's* line, along said line to *Jacob Hagler's*, from thence to a Hickory corner of said *Hagler's*, thence along said *Hagler's* line to the beginning.



The only question was, whether the defendants line should be closed by a line drawn immediately from *Blackburn's* corner F. to *Hagler's* line, near to the corner D. according to the dotted line, or be continued to the creek at E. and from thence to G. and then along *Hagler's* line to D. It appeared in evidence that when this deed was made, it was supposed that *Blackburn's* land extended to *Hagler's*; and a witness who was along when the lines were run, said that they ran immediately from *Blackburn's* to *Hagler's*, and did not include the land in dispute. One witness said that the Hickory corner D. was thought by

come to be *Blackburn's* corner. It was also proved that the plaintiff had several times said, that he had parted with all the land he owned there. The jury, under the direction of the presiding Judge, found a verdict for the plaintiff, and this was a motion for a new trial.

Mr. Justice *Nott* delivered the opinion of the court.

The only question in this case is, whether the defendants lines shall be closed by running a line immediately from *Blackburn's* corner F. to *Hagler's* line near to the corner D. or whether it shall continue along *Blackburn's* line to the Creek, and from thence to *Hagler's*, in such a manner, as to enclose the land in dispute. The question may be considered in a two fold point of view, 1st. As it regards the construction of the deed, when taken with reference to the lines only; and secondly, when taken in connection with the other testimony.

The object of every deed of conveyance is, to transfer from one person to another, some given quantity of land. The most usual, and the most satisfactory method of identifying the land intended to be conveyed is, by the metes and bounds, which are usually designated by visible lines and corners. When those cannot be found, the courses and distances called for in the deed, if any, must be resorted to. If either of those fail, or are ambiguous, either in the whole or in part, we must resort to the other. And where both fail, or are doubtful, then we may resort to the quantity to remove that doubt. In the present case, we derive no assistance from the courses and distances, because none are mentioned. If we look to the metes and bounds, we find them sufficiently designated, until we arrive at *Blackburn's* corner, at F. From thence, the mind is left, without any certain or visible guide, by which it can be directed. The words of the deed are, "along *Blackburn's* line, to *Jacob Hagler's*." If *Blackburn's* line extended to *Hagler's* there would be no difficulty in the case. But it is never nearer *Hagler's* line than at the corner F. And if we pursue that line, we shall never

reach *Hagler's* land, and of course shall never close the defendants lines. The only practical method therefore, would seem to be, that which has been adopted by the jury. The probability is, that if the plaintiff intended to have sold to the creek, he would have called for it as a boundary. If we have a regard to the quantity conveyed, we shall come to the same conclusion, because, as the lines are now closed, the defendant has two hundred and twenty-three acres more than he purchased.

If we look to the supposed state of things at the time the deed was made, the whole difficulty vanishes. All the parties then thought that *Blackburn's* and *Hagler's* lands joined; and the language of the deed supports that view of the case. Indeed, one witness who was present, proves that the line was actually run in that manner. Another witness says that some supposed the Hickory to be *Blackburn's* corner. But it is obvious that could not have been *Welch's* idea, because he calls for *Hagler's* line between that corner and the creek, and expressly calls it *Hagler's* corner.

I do not think that any thing unfavorable to *Welch's* claim can be inferred from his declarations that he had parted with all the land he had there. He supposed at that time that *Blackburn's* and *Hagler's* lands joined, in which case he would not have had any land there. But it does not follow, because it turned out otherwise that the land must belong to the defendant. I am satisfied with the manner of location; and I should not be less so, if the question was still more doubtful. If the doubt could not be removed by another verdict, it is a sufficient reason for supporting this.

The motion therefore must be refused.

Justices *Colcock*, *Johnson*, *Huger* and *Gantt*, concurred.

Mr. Justice *Richardson* dissented.

De Saussure & *Holmes*, for the motion.

Williams, contra.

(a.) See *Ante*, *Colclough vs. Richardson*, 167.—B.

WILLIAM MATHESON vs. JAMES CRAIN.

Where the assignee of an open account sues in his own name, and declares on a promise made to himself, and the defendant confesses judgment, the court will not suffer that judgment to be arrested for such irregularity.

THIS was an action of assumpsit, tried at Lancaster, Spring Term, 1821. It purported to be founded on a promise made by the defendant to the plaintiff. But by the account filed with, and annexed to the declaration, it appeared to be a debt originally due to *John McKenzie*, and assigned by him to the plaintiff. The defendant had confessed judgment, and this was a motion to arrest the judgment, on the ground that a person could not maintain an action as endorsee on an open account.

Mr. Justice *Nott* delivered the opinion of the court.

A motion in arrest of judgment must always be founded on some error, appearing on the face of the record. From the declaration in this case, it would appear that the foundation of the action was a promise made by the defendant to the plaintiff. But by the account annexed, the debt appears to have been originally due to *John McKenzie*, and endorsed by him to the plaintiff. And although an open account cannot be assigned so as to enable the assignee to maintain an action in his own name; yet the defendant may waive the error, which he did in this case by confessing judgment. There is no error appearing on the face of the record, unless the account be taken as a part of it. And even then we may suppose a subsequent promise to pay to the plaintiff, upon such consideration as would be obligatory on the defendant; and the court will presume so after a confession of judgment.

The motion therefore must be refused.

Justices *Colcock*, *Richardson*, *Huger*, *Johnson* and *Gantt*, concurred.

Bullard, for the motion.

Williams & Clinton, contra.

RICHARD SMITH vs. HUGH McCALL.

An implied warranty does not extend to the moral qualities of a slave.

Columbia, Spring Term, 1821.

THIS was an action of assumpsit, brought on a note of hand, given for a part of the purchase money of a negro slave. The defence set up was, that the negro had an inveterate habit of running away, which so much impaired his value, that the plaintiff was not entitled to receive more than had already been paid. It appeared in evidence that the plaintiff had given a bill of sale, warranting the title and soundness of the negro, but nothing else.

The plaintiff objected to the testimony, offered in support of the defence, on the ground,

1st. That the law does not imply any warranty of the moral qualities of a slave.

2d. That where there is an express written warranty, to a certain extent, the law does not imply nor even permit parol evidence of an express warranty beyond what is embraced in the written agreement.

The presiding Judge overruled these objections, and the defendant obtained a verdict.

This was a motion to set aside that verdict, and to grant a new trial on the grounds above stated.

Mr. Justice *Nott* delivered the opinion of the court.

The principle which has been so long established in this state, that a sound price implies a warranty of soundness of property, has been found in practice to open the field of litigation to such a boundless extent, that it seems to become our duty to endeavor to define its limits with some more precision than heretofore, and to set some bounds to the mischief which is likely to flow from it. This doctrine is said to have been derived from the civil law, and that as we have adopted a part, we must take the whole of the civil law relating to the subject. First, it was applied to the physical soundness of the property, where there was

no express contract. Next, it was extended to cases where there was an express written warranty, beyond the terms of such warranty. And now it is attempted not only to go beyond the express written warranty, but to extend it to the moral qualities also. That the principle adopted by our courts, that soundness of property shall be implied from the soundness of price, may not be theoretically, and perhaps morally correct, I am not prepared to say. But it has been found, by experience, to be too refined for practical purposes, and furnishes a pretext in every case of a bad bargain to set aside the contract under a pretence of some defect in the property. I have no idea, myself, that the Judges, who first established the doctrine, intended to introduce a rule of the civil law in opposition to the common law. I believe that it was then considered as a rule of the common law. *Woodison*, in so many words, lays down the law to be so; (vol. 2, 415.) And other respectable authority may be found in its support. (*Powell on Con.* 150.) It is conceded that selling for a sound price carries with it a warranty of title; and reasoning from analogy, one would perhaps conclude that soundness might as well be implied as title. By the common law a man may recover back money paid on a consideration which has failed. (*Moses vs. Macferlan*, 2 Burr. 1012, *Shone vs. Webb*, 1 D. & E. 732, *Straton vs. Rastalls*, 2 do. 366.) And where can the consideration be said to have failed, if it be not where a person has purchased property apparently sound, but which contains a secret defect undiscoverable by the most scrutinizing eye, which renders it entirely useless? It is admitted that where one man gets the money of another into his hands, which *equo et bono* he ought not to retain, it may be recovered back in an action for money had and received; and where can the demands of equity and good conscience be more imperious, than where a person has sold as sound a piece of property which is utterly unsound and worthless. So where the property is defective in part, the consideration has failed *pro tanto*, and the money may be recovered back. Every policy of

insurance is predicated on an implied warranty, that the vessel is sea worthy; which is only another name for soundness. In the case of *Parkinson & Lee*, (2 East, 314,) Justice *Gross* says, "that before the case in *Douglas*, (by which I suppose he means the case of *Stewart* and *Wilkins*,) it was a current opinion that a sound price given for a horse was tantamount to a warranty of soundness, but that when it came to be sifted, it was found to be so loose and unsatisfactory a ground of decision, that *Lord Mansfield* rejected it." It is also worthy of remark, that when the decision of *Stewart* and *Wilkins* was made, there was but little intercourse between that country and this.—That decision probably was not known here for many years after it was made. What is the conclusion then to be drawn from all these authorities? Not that the Judges of this state have adopted the civil law in opposition to the common law; but that when the common law was unsettled and fluctuating, while the Judges in England were sifting it on one side of the Atlantic, the Judges in South-Carolina were sifting it on the other, and that they came to different conclusions on the same question. Indeed, it seems, owing to the high authority of *Lord Mansfield* alone, that the law was so settled in England. For if he had adopted the then prevailing opinion, the law would have been in England, at this day, the same as it is in this state. I do not think, therefore, that the Judges of this state are chargeable with a departure from the common law, although they have differed with the Judges in England on a particular question. It is not the less a principle of the common law, because it is conformable to the civil law also. Many of the principles of the civil law have been incorporated into and made a part of the common law. Indeed the Roman codes have furnished a rich source from whence many of the best principles of the common law have been derived. But we can only adopt the civil law, where it comports with the general principles of the common law, and then subject to the rules of the common law on the same subject. I feel authorized to

to conclude, therefore, that when the courts of this state established the rule that a sound price was tantamount to a warranty of soundness of property, it was as a rule of the common law, and not of the civil law. And lastly, the act of 1712, declares, that the common law shall be the law of this state. And it is not to be presumed that the Judges would feel themselves authorized to adopt any other law in opposition to the express letter and spirit of an act of the legislature. Having differed with the English Judges on the subject of implied warranties, imposes on us no obligation to carry the doctrine to the mischievous extent to which the civil law would carry us. We ought still to be governed by all the common law rules in relation to the subject, except so far as we are bound by the decisions of our own courts. I do not mean to say I should have concurred in opinion with the learned Judges of that day.— On the contrary, I think it is to be regretted that such a decision has ever taken place, for the reasons already expressed. But we have still the satisfaction to find the principle has never been extended to the moral qualities of a slave. That cases have passed *sub silentio*, where such a defence has been allowed, I have no doubt. From expressions used in some of the reported cases, it appears that the distinction has not always been observed, although the question is not directly involved in any of them. There does not appear to have been any direct decision on the point. The impossibility of fixing any scale by which the moral qualities can be graduated, is a conclusive reason why such a principle should not be allowed. The character of a slave depends so much upon the treatment he receives, the opportunities he has to commit crimes, and the temptation to which he is exposed, that we can form but a very imperfect opinion of it, abstracted from those considerations. A vice which would render him worthless in one situation, would scarcely impair his value in another. A habit that would render him useless to one man, would scarcely be considered a blot upon his character in the hands of another. If it should be extended to

one fault, it must to all, from the highest crime which man is capable of committing, down to the smallest deviation from the strictest line of moral rectitude. Such a decision from this court, when publicly known, would be worse than opening Pandora's box upon the community. I am satisfied, therefore, that such a defence ought not to be allowed, except where it is supported by an express warranty or actual fraud.

It is unnecessary, therefore, so far as regards this particular case, to express any opinion on the other ground.— Still it may be well that it should not be passed over unnoticed. I have always considered it a settled rule of the common law, that when a contract is reduced to writing, the parties are never presumed to have undertaken any thing more than is contained in the writing itself. An express warranty, therefore, of any particular thing or quality, would seem to exclude the idea of any other.— And when a written warranty exists, an express parol warranty, varying from it, ought not to be admitted. In the case of *Munford vs. M'Pherson*, (1 *Johnson's Rep.* 414,) Chief Justice *Kent* asks emphatically, "Can a case be found where an action has been brought on a parol contract made *uno flatu* with a written contract." And Judge *Thompson*, who delivered the opinion of the court, says, "it cannot be a safe or salutary rule to let a contract rest partly in writing and partly in parol. Whenever it is reduced to writing, that is to be considered as evidence of the agreement, and every thing resting in parol becomes thereby extinguished."

In the case of *Wells & Spears*, decided in Charleston at the last term, this court did sustain an action brought on an implied warranty of soundness, where there was a bill of sale containing only a warranty of title. I then differed with the majority of the court in opinion; and I believe the decision was admitted to be contray to the common law doctrine. But as a practice had long prevailed of allowing such actions, without regarding the distinction between cases where there was a written warranty

and where there was none, it was thought that it would be dangerous to innovate upon it. But that decision applies to cases of unsoundness only. Whenever we depart from a settled rule of the common law, I feel as if I were walking *per ignes suppositos cineri doloso*. We cannot foresee to what it will lead. Some unsuspected mischief lurking under a specious good is apt to spring up to bear witness of an error which it is too late to correct. The common law is the result of wisdom and experience, and ought not to be invaded without great caution and deliberation.

In the present case the court are unanimously of opinion the defence ought not to be allowed. And I hope this decision will close the door which was just unfolding a scene of litigation hitherto unknown to this country. I feel no disposition on my part, to add to the accumulated weight of business under which we are already tottering; *imponere Pelio ossam, atque ossæ frondosum involvere olympum*.

The motion for a new trial must be granted.

Justices Colcock, Johnson, Richardson and Huger, concurred.

Gregg, for the motion.

De Saussure, contra.



JAMES HOOD vs. DAVID ARCHER, and others.

The will of a feme covert giving her property to her husband is void, though made with his consent.

THE only question in this case was, whether a feme covert could, by her last will and testament, made with her husband's consent, bequeath her choses in action to him.

Mr. Justice Nott delivered the opinion of the court.

In *Roberts*, on wills, 28, it is laid down that "a woman under coverture cannot make a will, either of lands or of

goods, not even of her paraphernalia, without her husband's consent, nor of her debts and choses in action, which are not divested out of her by the marriage, and do not survive to the husband." This inability arises from the well established principle of the common law, that her civil rights are merged in the husband; all her contracts are absolutely void; she can make no disposition of any of her property, either by deed, will, or otherwise. It is admitted that she may dispose of her choses in action with the consent of her husband. (*Richardson*, 35.) But that is considered more in the nature of an appointment, to be carried into execution by the husband than a testamentary bequest. (2 *Atkins*, 49.) And it derives its efficacy more from the consent of the husband than the will of the wife. It appears, however, that effect is frequently given to the testamentary dispositions of the wife in the Equity courts of England; as where the husband stipulates that certain personal property shall be enjoyed by the wife separately. In such cases, it is held that it shall be enjoyed by her with all its incidents; whereof the *jus disponendi*, is one. And where she has this power over the principal she must necessarily have it also over its produce and accretions. But our Court of Equity has never recognized such a derivative power in a feme covert, as I have been informed by one of the members of that court. They consider a testamentary disposition of the wife, as deriving its whole support from the consent of the husband.

It has been contended, in this case, that if a feme covert have a right to make a testamentary disposition of her property, she may give it to whom she pleases, and as well to her husband as to any body else. But that deduction does not follow.

If her power to bequeath was derived alone from her right to hold property, that would seem to be a correct inference. But if it is derived alone from the consent of the husband, then it must be so exercised as to furnish no ground of suspicion that she acted under the influence of his persuasion or coercion. Mr. Justice Lawrence, who

delivered the opinion of the court, in the case of *Scammel vs. Wilkinson*, 2 East, 555, cites a passage from 4 Co. 61, (b.) that the law of England will not allow of any custom that a feme covert may make any devise; for the presumption that the law has, that it will be made by the constraint of the husband. To which the same learned Judge adds, "If this reason be applied to testaments, she can make none, unless it be by the consent of the husband, and to his prejudice; in which case a restraint cannot be presumed." I apprehend that the same reason does apply to testaments as to devises. The law so carefully protects the wife against the influence which the husband is supposed to exercise over her, that it even visits her crimes upon him when committed in his presence, upon the presumption that she acted under his coercion. The power of a feme covert to bequeath is precisely the same as to give or sell; either of which would be good against the husband, if done with his consent. It would, indeed, be considered his act. A bequest of a feme covert then to her husband, with his consent, is nothing more or less than a gift of the husband to himself. It is to be observed, that there was no covenant or written agreement between the husband and wife in this case, that she might dispose of her separate estate. There was nothing more than his verbal assent that she might give it to him. The opinion of the court is, that the ordinary decided correctly in refusing to admit this will to probate, and this motion must therefore be refused.

Justices *Huger*, *Johnson* and *Richardson*, concurred.

Levy, for the motion.

Holmes, contra.

JOHN HUDNAL vs. JOHN TEASDALL.

A deed is not void against a subsequent purchaser, merely because it is voluntary, even though the person making it should owe some considerable debts at the same time.

Where personal property is conveyed by a husband to a trustee, for the benefit of his wife and children, the subsequent possession of the husband is consistent with the object of the deed, and is no evidence of fraud in behalf of a subsequent purchaser. (*a.*)

THIS was an action of trover, for a negro man, tried at Sumter Court-house, Fall Term, 1821.

It appeared that the negro in question, with certain other property, had been conveyed in the year 1819, by *Luke Norris*, to the plaintiff in this action, in trust for the wife and children of the said *Norris*. The property continued in the possession of *Norris* for several years, when this negro was levied on and sold under execution by the sheriff of Sumter district, to satisfy a debt of his, created previous to the execution of the deed. The plaintiff appeared and forbid the sale. He was nevertheless sold and purchased by the plaintiff. The debt for which he was sold was only about twenty dollars. The overplus of the money for which the negro was sold, was not actually paid to the sheriff, but a receipt was given to him by *Luke Norris*, for the protection of *Hudnal*, the trustee. The negro went back into the possession of *Norris*, and continued there until the year 1817, when he sold him to the defendant.

It appeared further, that before the defendant purchased, he was informed that the plaintiff had a claim to the negro, and was advised not to purchase. The witness says he did not inform him of this particular deed, because he did not recollect that he had ever seen it.

As soon as the defendant obtained his bill of sale, he took a witness and called upon the plaintiff to know if he had any claim to the negro. The plaintiff at first told him he had; he afterwards said he had none. But shortly after the defendant got the negro into his possession, the plaintiff made a demand of him, and commenced this action.

Some attempt was made to prove that *Luke Norris* was very much in debt when he executed the deed to *Hudnal*. But it did not appear that he owed more than about fifty dollars, which had been since paid.

The grounds of defence on which the claim of the defendant rested, were :

1st. That as *Luke Norris* was indebted at the time he made the deed of trust to *Hudnal*, and being a voluntary deed, without a valuable consideration, it was void against subsequent purchasers and creditors.

2nd. Permitting the negro to remain in the possession of *Luke Norris*, was sufficient evidence that his claim was founded in fraud.

3d. The declaration of *Hudnal* to the defendant that he had no claim at a time when he had it in his power to save himself, ought to be conclusive against him.

The jury found a verdict for the defendant, and this was a motion for a new trial, on the ground that the verdict was contrary to law and evidence.

Mr. Justice *Nott* delivered the opinion of the court.

In considering this case, I deem it unnecessary to notice the statutes 13th and 27th of *Elizabeth*, on the subject of fraudulent conveyances. I believe if those statutes, together with all that has been said, and all that has been written upon them were blotted from our law books, the loss would hardly be felt. They may indeed have embodied and given precision to certain principles of the common law, which it would have taken a longer time to have effected by the decisions of courts. But they contain nothing more than those plain principles of common honesty which have long since been recognized as forming a constituent part of the common law on the same subjects.— That a voluntary deed, the tendency of which is to defeat the rights of existing creditors, should be considered fraudulent and void, there can be no doubt. And that one, the object of which is to defraud subsequent creditors, may be considered equally so, I believe, is equally unquestionable. But to declare a deed, embracing lands and negroes void, merely because the party making it happened to owe a few inconsiderable debts, not exceeding fifty dollars, and which have been paid since, would be an entire misappli-

cation of the rule. In any view, however, this defendant is not entitled to the benefit of the principle, because he is not a creditor. He has indeed paid his money; but he has received the property as an equivalent. And until it is taken from him, the relation of debtor and creditor cannot subsist between the parties.

If the claim of the plaintiff had depended altogether on the bill of sale from the sheriff, the circumstance of his having permitted it to remain in the possession of *Norris* for such a number of years, would undoubtedly have been such an evidence of fraud as would have defeated it. But when we view him in the character of trustee, and consider him as purchasing in that capacity for the purpose of preserving the trust confided to him, it gives a different complexion to the transaction. The possession of the husband was the possession of the wife and children, and the possession and use of it for their benefit was consistent with the object and provisions of the deed.

The last I think is the most substantial ground of defence on which the defendant has relied, and even that cannot avail him on this occasion. Admitting that a *bona fide* purchaser from a trustee not having notice of the trust would be protected, the present defendant would derive no support from the admission, for he did not purchase from the trustee. It is contended, however, that the declaration of the trustee that he had no right went to establish the sale which *Norris* had made. But when we come to analyze that testimony, it is too unsatisfactory to be entitled to confidence. According to the witness, he at first said he had a claim to the property, the next moment he said he had none, and the first step he took afterwards was to bring an action to recover the value of it. The only method by which these seeming inconsistencies can be reconciled is, (if he made any such declaration) to suppose he said what was true, that he had no *personal* interest in the property. The court would not readily give such a construction to the testimony as would make the trustee guilty of a palpable fraud, without any apparent interest,

and which would go to defeat the interest of the *cestui que trust*. But suppose the testimony to be literally true, the false affirmation was made after the bargain was concluded, and therefore could have had no influence upon it. It is said that if the defendant had then been correctly informed, he might have got his money back. But that is a mere speculative opinion which the court cannot regard.— He might however have avoided the difficulty had he made the inquiry before hand. He was apprised of the plaintiff's claim; he nevertheless chose to purchase first, and set about the inquiry afterwards. I think the effect of the notice which was given him previous to the purchase, was not sufficiently impressed upon the minds of the jury. Where an act of the legislature declares an unrecorded deed absolutely void, the court will not give it effect against a subsequent deed, unless the purchaser has actual and explicit notice. (*Tart & Crawford*, during this Term.) But there is no act declaring unrecorded, deeds of this description void.

Such notice, therefore, as would enable him, with ordinary diligence to ascertain the fact, and particularly when it was so completely within his reach, ought to be deemed sufficient. In addition to the notice given him by the witness, the deed was actually recorded in the register's office of the district where the defendant's deed was also recorded. And although there is no law requiring it to be so recorded, yet it was calculated to give it publicity, and strengthens the evidence before given, that he must have known of its existence.

The fact also of his calling upon the plaintiff, immediately after his purchase, is conclusive of the fact.

I am satisfied therefore that a new trial ought to be granted.

Justices *Richardson*, *Huger* and *Johnson*, concurred.

Waties, for the motion.

De Saussure, contra.

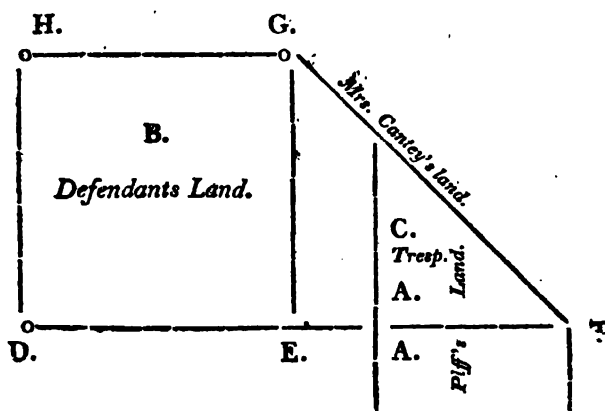
(a.) *Vide Kid vs. Mitchell*, 1 *Nott & M'Cord*, 339.

SAMUEL E. NELSON and wife, vs. JOHN FRIERSON.

The lines of a tract of land must always be extended to the bounds called for, where no evidence of a higher nature intervenes to control them.

THIS was an action of trespass to try titles. Tried at Sumter, Fall Term, 1821.

The case depended altogether upon the manner of closing the defendants lines. According to the courses and distances called for in the original grant, he would have been entitled only to the land enclosed within the lines D. E. G. H. But the verdict of the jury extended the line D. E. to F. so as to embrace the land within the lines D. F. G. H. On the original plat, a stake was called for at E.; but upon a resurvey no stake was found, nor any evidence given on the trial that one was ever there. No marks were found on the line *E. G.* The trespass was alleged to be at C. on the tract of the defendants land should be limited to the line E. G. he was guilty of a trespass, and the verdict ought to be set aside; if it should be extended to F. G, then the alleged trespass was on his own land, and the verdict ought to remain undisturbed.



Mr. Justice *Nott* delivered the opinion of the court.—

The decision of this case must depend upon the application of a well established rule of surveying, that the lines must always be extended to the bounds called for where no evidence of a higher nature intervenes to control them. The defendants grant calls for Mrs. Canty's land, which is represented by the line F. G. If the stake called for at E. had been found or evidence given that it ever existed; or if any marks had been found on the line E. G. the stake so proved or the intersection at D. E. would have established the corner E. and limited the defendants claim to the line E. G. But as no such evidence was given, it must go to Mrs. Canty's land, notwithstanding the great extension of the line D. F. and the distortion of the plat. Were it otherwise, every angle between two adjoining tracts of land, and even the patches which would be left in the meanders of a river, would be held vacant; to the great annoyance and disturbance of the community, and to the destruction of a rule of decision, which has always prevailed in this state. This rule, to be sure, sometimes leads to consequences which are apparently extravagant and unreasonable. But its great value is in its certainty, because in certainty, we find security. The motion therefore must be discharged.

Justices *Huger*, *Gantt*, *Johnson* and *Richardson*, concurred.

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JETER *ads.* STATE.

The tenure by which an office is held, does not depend upon the commission which the governor may think proper to give. It is only evidence of the appointment. The tenure must depend upon the provisions of the act creating the office, or upon the Constitution.

No office exists in this state by prescription.

As the Constitution has not prescribed the tenure by which a solicitor shall hold his office, the act creating the office is the proper source from which that information is to be derived.

The act of 1791, has given to the solicitors all the privileges, emoluments and advantages of the Attorney-General, and subjected them to all his duties; and the tenure by which they hold is the same.

By the Constitution of 1776, the Attorney-General held his office during good behavior. By the Constitution of 1778, it was declared, that the Attorney-General should hold his office for the term of two years, and until a successor should be appointed. The Constitution of 1776 was repealed by that of 1778, and the Constitution of 1778, as far as it concerns the Attorney-General, was not repealed by that of 1790. The Attorney-General therefore must have held in 1796, under the Constitution of 1778, and the act of the legislature of 1791, giving to the solicitors all the privileges, &c. of the Attorney-General, must have intended to limit the solicitor's office to two years, and until another was appointed.

THIS was a rule on *J. S. Feter*, to shew cause why an information should not be filed, to ascertain by what authority he exercised the office of Solicitor on the Southern Circuit.

In support of the rule, a commission was produced, which had been issued to *Robert Stark*, in December, 1806, for the same office, "to hold during good behaviour."—He was elected under and by virtue of an act, passed in December, 1791.

It appeared that *Mr. Alexander Moultrie* had been appointed Attorney-General in 1776, and held his office under the constitution of that year, "during good behaviour." He resigned in December, 1792, when *Mr. Pringle* was elected.

On the return of the rule, *Mr. Feter* shewed for cause "that he had been elected Solicitor by the legislature, in December, 1820," and produced his commission from the Governor.

He was elected under and by virtue of the act of 1812, which limits the tenure of a solicitor's office to four years; and declares that the then incumbents should be regarded as holding their offices only until 1816.

That in December, 1816, an election was held in conformity to the act of 1812, when *Mr. Stark* was elected.

That he received his commission, and gave bond and security as required by that act.

That in 1820, another election was held, when *Mr. Stark* was a candidate, but was not elected.

After argument, the rule was made absolute in the Circuit Court, and a motion was now submitted to reverse that order.

Mr. Justice *Huger* delivered the opinion of the court.

The tenure by which an office is held, does not depend upon the commission, which the governor may think proper to give—it is only evidence of the appointment. The tenure must depend upon the provisions of the act creating the office, or upon the constitution. No office exists in this state by prescription. It is necessary then to look beyond the commission, to ascertain the tenure of the office held by Mr. *Stark* anterior to 1812.

If a commission issued by the governor cannot controul the provisions of an act of the legislature, neither can an act of the legislature controul a provision of the constitution, and for the same reason, neither possess original power—in both it is derivative—each therefore must be governed by the authority under which it acts. Supreme power exists in the people alone. They have in the constitution declared, what portion of that power shall be used by the different departments—neither has a right to encroach upon the other.

If the people declare and ordain in their constitution, that an office shall be held by a particular tenure, or that the obligation of a contract shall not be violated, it would be as much usurpation in the legislature to alter that tenure or violate the obligation of the contract, as it would be in the governor to commission for a longer period, than directed by the legislature.

It is made the duty of the judiciary to enforce the paramount law; and it is unworthy of consideration, whether it be an act of the legislature conflicting with the commission of a governor, or a provision of the constitution with an act of the legislature, or two acts with each other. In every case, the Judges are bound to use their utmost discretion.

As the constitution has not prescribed the tenure by

which a Solicitor shall hold his office, the act creating the office is the proper source from which that information is to be derived.

The act of 1791, has given to the Solicitors all the privileges, emoluments, and advantages of the Attorney-General, and subjected them to all his duties. It appears to have been the intention of the legislature to assimilate them in every respect. The tenure by which they hold is then the same. To determine therefore, by what tenure the Solicitors held under the act of 1791, it is only necessary to ascertain that of the Attorney-General. Under the constitution of 1776, the Attorney-General held his office during good behaviour. In the constitution of 1778, it is declared that the Attorney-General shall hold his office for two years and until a successor should be appointed. This constitution however, in limiting the terms of several offices, has exempted from its operation all the incumbents then in office. The constitution of 1790, now in force, after fixing the terms of several offices, of which that of Attorney-General is not one, declares "that all other officers shall be appointed as they heretofore have been, until otherwise directed by law." The constitution of '76 was repealed by that of '78, and the constitution of '78, as far as it concerns the Attorney-General's office, was not repealed by that of 1790. The Attorney-General therefore must have held in 1791, under the constitution of 1778; and the legislature of 1791 must have intended to limit the Solicitor's office to two years, and until another was appointed.

It is however contended that the act of '91 does not refer to the tenure, fixed by law for the Attorney-General's office, but to the tenure of the then incumbent (*Mr. Moultrie,*) who it is said was commissioned anterior to the constitution of '78, during good behaviour, and who did not resign before 1792.

This argument rests upon the presumption that the legislature of 1791 knew that the Attorney-General, then in office, held it during good behaviour under the consti-

tution of '76. But what ground is there for this presumption? He had been appointed fifteen years before, during the first struggles of a civil war. The very constitution under which he was appointed, was so imperfect as to last but two years, and it was succeeded by that of '78, in which it was enacted that the Attorney-General should hold for two years, and until another was appointed. The civil war, the alternate possession of a great portion of the state by Whigs and Tories, and that multitude of interesting national events, which were crowded into the period between '75 and '91, were calculated to efface from the memory a fact so unimportant as the appointment of an Attorney-General. The very constitution, indeed, under which he had been appointed, had never been printed, and must have been soon buried and forgotten among the records of an earlier day.

If it be improbable that the legislature of '91 adverted to the special tenure of the then Attorney-General, it is more than probable they were well acquainted with the general provisions for that office in the constitution of '78.

Most of the members must have been of the convention which formed the constitution of '90; the greater part of which was borrowed from that of '78.

It was their duty to be acquainted with the one, and there was no motive to be informed of the other.

It is therefore more probable that they intended to refer to the limitations of the constitution of '78, than to the commission of Mr. *Moultrie*, under the constitution of '76.

The provision in the constitution of '78 having been saved by the constitution of '90, it was not repealed before the act of 1812.

The successor of Mr. *Moultrie*, therefore, in 1792, held his appointment under the constitution of '78. If then the act of '91 did not refer to the constitution of '78, but to Mr. *Moultrie's* commission, the Solicitors in '92, held during good behaviour, and the Attorney-General but for two years, and until another was appointed. But the act of '91, evidently intended to embrace them within the same

tenure ; it could not then have referred to Mr. *Moultrie's* tenure.

If the act of '91 could be so construed as always to regulate the tenure of the Solicitor elected, by the tenure of the Attorney-General, who happened at the moment to be in office, it would not avail Mr. *Stark* in this case, for he was not elected until '96, when the Attorney-General in office held only for two years, and until another was appointed.

As the Solicitor under the act of '91 can be regarded as holding his office only for two years, and until another should be appointed, Mr. *Stark* could only have held his office from '98, until another was appointed. The two years had then expired ; it was then in the power of the legislature to make such disposition of the office as they thought best.

I have deemed it unnecessary to express an opinion on the other grounds taken in this case. They involve great constitutional doctrines, which ought never to be approached but with great consideration, and only decided when absolutely necessary. The motion is granted.

Justices *Johnson, Colcock, Nott, and Richardson*, concurred.

Sanford and Miller, for the motion.

Gregg and M^r Duffie, contra.

THE STATE vs. EPHRAIM LYLES.

A person elected ordinary under the act of 1812, which limits the duration of office to four years, is in under the constitution, and is entitled to hold his office during good behaviour, although commissioned only for four years.

Chester district, Spring Term, 1821.

THIS was an application to the court for a rule on the defendant, to shew cause why an information in the nature of a *quo warranto* should not be granted against him,

to shew by what authority he exercised the office of ordinary of Chester district. It appeared that the defendant had been elected ordinary in the year 1815, and commissioned by the governor for four years, pursuant to the provisions of the act of 1812, which limited the duration of the office to that period. But it was contended that he was a judicial officer, and therefore under the provisions of the first section of the third article of the constitution, was entitled to hold his office during good behaviour.

The presiding Judge being of that opinion, discharged the rule.

This was a motion to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the court.

In the case of *Hays & Harley*, (1 *Con. Rep.* 267,) it was decided that the ordinary was a judicial officer in the contemplation of the constitution, and therefore entitled to hold his office during good behaviour. And although I dissented from that decision, yet the question having been settled, I think it ought not again to be disturbed. *Harley* had indeed been elected before the year 1812, when there was no limitation of the office by any act of the legislature, and had been commissioned during good behaviour. But the principle on which the two cases depend, is nevertheless the same. If the constitution secures to the ordinary his office during good behaviour, it cannot be abridged by an act of the Legislature; neither can it be limited by the terms of the commission. The governor, in granting a commission, acts ministerially, and therefore ought to make it conform to the law and the constitution. The commission does not confer the office; it is only evidence of it, and cannot change the tenure by which the constitution declares that it shall be held. As soon as an ordinary is elected, he is in office under the constitution, and entitled to all the rights and immunities conferred by that instrument.

Whether such a construction would be given to a mere temporary appointment by the governor, during an occa-

sional vacancy of the office until an election could take place, is a question on which it is not now intended to express an opinion. A person so appointed may, perhaps, be considered in the nature of a *locum tenens*, without acquiring a permanent tenure in the office. The public good would seem to require that such an office should always be filled, and it is the duty of the government to take care. *ne quid detrimenti respublica capiat.*

The motion in this case must be refused.

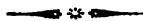
Justices *Colcock*, *Johnson*, *Gantt* and *Huger*, concurred.

Justice *Richardson* :

I acquiesce in this decision by reason that the point has been before decided.

Williams, for the motion.

Fernandis, contra.



This case, and the succeeding one are not of this term, but it was thought best to place them together with the two antecedent cases of *Lyles* and *Jeter* ; as they were all on constitutional questions very similar in their nature.—R.

THE STATE vs. WILLIAM M. HUTSON.

Ordinaries, by the third article of the constitution of this state are judicial officers, and hold their offices during good behavior ; and where the governor, under the act of 1815, appointed an ordinary to fill a vacancy, although the act authorizes him only to make a temporary appointment until an election shall take place, yet the ordinary being in office, he is in under the constitution, and holds during good behaviour.

Beaufort district, April Term, 1821. Tried before Mr.
Justice *Colcock*.

THIS was a rule to shew cause why an information of *quo warranto* should not be ordered against the defendant, acting as ordinary of Beaufort district, alleging an usurpation of that office, and requiring the defendant to shew by what authority he claimed it. To this, defendant shewed

for cause, that by the constitution of this state, the ordinary is a Judge, holding his office *during good behaviour*. That although by the constitution, the mode of appointment is left in the discretion of the legislature, yet the tenure of the office is placed beyond their control. That by one clause of the act of 1815, the election of ordinary is given to the people, and by another clause of the same act, the governor is authorized to fill any vacancy that should occur. That *Robert G. Norton*, formerly ordinary of Beaufort district, having in January, 1819, vacated the office of ordinary, the governor appointed the defendant ordinary, and commissioned him in February, 1819, to hold until an election, according to the act of 1815. That such an appointment vests the office during good behaviour, under the constitution, the limitation of tenure "till an election being void." Whereupon the defendant prays that the said information may not be allowed against him.

On the return of the rule, the Judge decided that the cause shewn was sufficient; that the defendant was entitled to his office "during good behaviour, and discharged the rule."

An appeal was therefore made, upon the ground, that the defendant was, by his appointment and commission only entitled to his office till an election held, which having taken place, the defendant's commission had expired.

Mr. Justice *Richardson* delivered the opinion of the court.

In the case of *Hays vs. Harley*, (1 *Con. Rep.* 267,) this court decided that ordinaries, by virtue of the third article of the constitution of this state, are Judges of Inferior Courts, and hold their commissions *during good behaviour*. And in the case of the *State vs. Lyles*, (*Ante*, 238) ordinary of Chester district, it has been further decided, unanimously, that although the defendant had been elected under the act of 1815, and had received a commission for four years only, according to the provisions of the act of 1812, still his tenure of office was under the constitution,

and that he held his office during good behaviour. These two adjudications, by deciding that ordinaries are Judges of Inferior Courts, within the meaning of the constitution, facilitate greatly the decision in the case now before us.—*We must now hold the principle settled, and respect it.*

The power of appointing ordinaries is given to the governor by the act of 1815, in these words, to-wit: "That the governor shall have power, and he is hereby required to fill up all vacancies in either of the offices aforesaid, (of which the ordinary is one) that shall take place," &c. "To hold under such appointment, until such time as an election shall take place."

Upon this clause, two views opposite to each other have been taken, in order to distinguish the case before us from the adjudications just noticed :

1st. It has been suggested that the whole clause is unconstitutional, and the appointment of the defendant altogether void.

But by the constitution of this state, all legislative authority, with a very few restrictions, is given to the legislature, or general assembly. A law then, when enacted by that body, must be deemed constitutional, unless it comes plainly within some constitutional exception to the general power of legislation. And although the third article of the constitution is, by obvious implication, one of the restrictions, and renders abortive any attempt to alter the tenure in office of certain judicial officers, of which the ordinary has been decided to be one ; still, though a part of the clause should come within that restriction, the rest may, notwithstanding, be constitutional. For although some provisions of an act be unconstitutional, yet it does not follow, on that account, that the whole is void. Now, the clause of the act of 1815, before noticed, has two objects, first, *the manner of filling vacancies* ; secondly, *the term of office to be holden by the appointees*. The former is clearly constitutional, because there is no restriction upon the manner of appointing Judges of Inferior Courts, and of course the power of appointing them, *may be given*

to the governor, or any agent of government. But the latter object, *i. e.* the term of office having been already fixed by the constitution, any legislation upon it is superfluous : and when the act goes to alter the term of office, it conflicts with the constitution, *and as far as it does conflict, the law to be harmless must be inoperative.* Written laws are to be so construed as to advance the end proposed, and in such a manner as that every part may prevail, if possible. And although a particular clause may not prevail in its full extent, because impossible or unconstitutional, in some one respect, yet, as far as it can be done, consistently with the constitution, we are bound to support it ; simply, because it is a legislative enactment. The great object of the clause before us, *i. e.* *the manner of appointment, being constitutional, is therefore authoritative.* But the attempt to alter the tenure in office, as it conflicts with a constitutional provision, fixing the tenure of such an office, cannot prevail. The act stands then precisely as if no alteration of the tenure had been attempted, and the appointment being made, the tenure in the office follows by virtue of the constitution, as if no law had been passed upon the subject of the tenure.

It has been suggested in the second place, in order to support the entire clause of the act, that temporary appointments may be necessary to preserve the continued exercise of the ordinary's jurisdiction ; and that the election by the people, preserves finally the tenure required by the constitution, as decided in the case against *Lyles*. But however true it is, that appointments under some authority are necessary, to the unbroken exercise of this, as well as of every jurisdiction, yet it does not follow that they must be temporary. The constitution consists chiefly of a recognition of certain general principles, deduced from experience, and established, because intrinsically wise, and practically beneficial. And it will not be questioned, that in order to be either wise or beneficial, these principles must be uniform. It is ever to be borne in mind too, that in the construction of the constitution, we are to regard the

main object and policy of the framers of that instrument, with a resolution that never flags. This is the governing rule, and knowing these, we are led to the true construction. Now what are the objects and policy of the third article of the constitution which should command such inviolable regard? They manifestly are, that the Judges, both of Inferior and Superior Courts, shall hold their offices, unawed by the influence of parties, and independent of men in power. It is to buoy up their resolution, and to confirm their integrity, more than for any other general cause; and with more reason in this country than any where else, that the judicial commission ought to continue during good behaviour. Because *here* the different constitutions not only guarantee the property of the citizen, his liberties and privileges, but constitute the sole means of marking out the distinction between the delegated powers and prerogatives of the confederated nation, and the independent rights of the individual states. And in laying down the proper line of demarcation, opposite interests, inveterate partialities, and jealous collisions, contending for supremacy, must put to the severest test the integrity, fortitude, and disinterestedness of the American Judiciary. Hence, the peculiar necessity of their independence. And it is evidently proposed that this essential independence of the Judges shall be insured by means of their offices being dependent but upon their own good behaviour. It is this permanency and security that the convention supposed, would, by placing the Judge out of the reach of fear, render him a firm and faithful agent, and would leave the assurance greatly increased, that under every emergency, the constitution would find in him the intrepid guardian of its principles. But if under any circumstances a Judge could hold a temporary commission, he would want the constitutional sheet anchor of independence and integrity; and his office, in derogation of the constitution, would depend too little upon his own good behaviour, and too much upon men in power, and the favor of electors. It would be vain to say, that an occasional in-

stance would be immaterial: the just observation, that what is precedent to day, becomes law to-morrow, would be strictly applicable. And were it once allowed that any such officer may be restricted by a temporary commission, it would be easy for ingenuity and influence to prepare the means of having the instance repeated; and in time they would become so multiplied, that the practical benefits of this leading principle of the constitution might be frittered away to insignificance. Yes, any such plastic power to be occasionally exercised in the modification of the principles of the constitution, would steal with insidious steps through its whole extent, and impair its strength, might moulder its strong cement into dust, and fatally sap that monument of wisdom which we now so confidently believe, *Monumentum aere perennius*. The principle must be preserved entire and perfect, or it ceases to be a constitutional principle; and we must therefore guard against the smallest violation. But observations need not be further multiplied. The adjudication first noticed, in deciding that under the constitution, the ordinary is a Judge of an Inferior Court, did, in my judgment, decide that wherever there can be an appointment of an ordinary at all, though the legislature may have the individual appointed in their own way; yet, when appointed, at the instant that he swears fidelity to the constitution, *that constitution solemnly assures to him his office during good behaviour.*"

The motion is therefore refused.

Justices Colcock, Gantt and Bay, concurred.

King, for the motion.

Grimke, contra,

THE STATE vs. THOMAS McCLINTOCK.

By the constitution, the sheriffs hold their offices for the term of four years; and where the governor, under the act of 1808, appointed a

sheriff to fill a vacancy, until an election should take place, such sheriff, being in office, is in under the constitution, and holds his office for four years.

Chester district, March Term, 1822. Information in form of a *quo warranta*. Tried before Mr. Justice *Johnson*.

THIS was an information filed in behalf of *John Kennedy*, Esq. against the defendant, charging him with wrongfully holding and exercising the office of Sheriff of Chester district, and keeping out the said *John Kennedy*, who it is alleged is entitled to the office.

The facts stated in the information are briefly as follows :

James M^cClintock, Esq. late sheriff, died before the expiration of his term of office. The defendant was appointed by the governor, under the act of 1808, until an election should take place, as provided by that act ; at which time an election was held, *Kennedy* and defendant were candidates, and *Kennedy* was elected, and thereupon claims the office.

Defendant pleaded the commission, and concluded that this appointment entitled him to hold the office for four years from the time of his appointment.

Demurrer and Joinder in demurrer.

The presiding Judge overruled the demurrer, on the ground that the constitution of this state had fixed the tenure of the office of sheriff at four years, and in whatever manner appointed, he had a right to hold it for that period.

The Solicitor moves this court to reverse the decision, on the following grounds :

1st. Because the appointment of the defendant did not create him sheriff, as contemplated by the constitution for four years, but only armed him with the powers of sheriff, and authorized him to exercise them *pro hac vice*, for the period of his appointment.

2d. Because the constitution only contemplated that those sheriffs shall hold their offices for four years, who are elected for that purpose in the manner prescribed by law.

3d. Because the decision of the presiding Judge is cou-

ary to the spirit and meaning of the constitution, and of the act of assembly, which is consistent with it.

Mr. Justice *Colcock* delivered the opinion of the court. In determining this case, I will inquire :

1st. What are the constitutional provisions in relation to the term of office ? And

2d. What are the provisions of the constitution and laws, in relation to the power of appointment by the governor ?

The first section of the sixth article of the constitution declares, " that the Judges of the Supreme Courts, Commissioners of the Treasury, Secretary of State, and Surveyor-General, shall be elected by a joint ballot of both houses in the House of Representatives, and that the three latter shall hold their offices for four years, but shall not be eligible again for four years after the time for which they have been elected.

The second section declares that all other officers shall be appointed as heretofore, until otherwise directed by law. But sheriffs shall hold their offices *for four years*, and not be again eligible for four years after the term for which they have been elected. From which, it is obvious that the framers of the Constitution meant to leave to the legislature the power of appointing these officers in whatever manner they should think fit ; but ordained a fixed and determinate time for which they should hold their offices. It was contended that the true construction of this second clause of the second section of the constitution is, that those who should be elected sheriffs should hold for four years, but not those who might be appointed.

But this is absurd, for first, there is no difference made between the duties and responsibilities of the officer appointed and the officer elected. In either case, he is a sheriff, an officer known to the law. Why then should they have intended that the sheriff, elected by the legislature, should hold for four years, and that he who should be elected or appointed by the governor, or any other authority, should hold for a less time ? Again, they gave the

power of appointment, subject to the limitation as to the term of office.

The argument of counsel is, that by exercising the powers given, they can also exercise that which was not given. By appointing, they can destroy the time for which the officer shall hold. This certainly was never intended; the object and nature of the constitution are too well understood, and the wisdom of its framers too conspicuous to admit of any such notion. As to some officers, they thought it necessary to fix both, the manner of appointment and the term of office. As to others, (and among those, sheriffs,) it was conceived to be sufficient to limit the term of office, and leave to the legislature the mode of appointment. The framers of the constitution evidently use the words election and appointment as synonymous. "All other officers shall be *appointed*." In the very clause in which they are speaking of sheriff, of whom in the next line, they use the word elected, and who were at that time chosen by the legislature. Again, in the oath of office, which applies to all, "I swear that I am qualified, under the constitution, to exercise the office to which I have been *appointed*." By the whole section then, it is clear that the sheriffs are to hold for four years, no matter how appointed.

In pursuance of the authority given by the constitution, the legislature in 1808, enacted, that the sheriffs should be elected by the people on the second Monday in January, in each district, where a vacancy should take place; and the same act gives to the governor the power of appointment, when the vacancies should not be filled by the people. The clause is in these words:

Be it enacted, That the governor shall have power, and he is hereby required to fill up all vacancies in the office of sheriff that shall take place by death, resignation, removal out of the state, removal from or expiration of office of any person possessing the same, or by any election of sheriff being declared void by the managers as aforesaid, or where any two or more candidates shall have an equal number of votes, to hold under such appointment, until such time as

an election shall take place, according to the provisions of this act. Now it is contended that the latter words do control the power of appointment as to time, and ought to be construed to mean until the next ensuing January. This would be contrary to the provision of the constitution, and consequently a void limitation of the governor's power. I will not readily believe, however, that this was the intention of the legislature; they are equally bound with ourselves to respect the constitution, and never intentionally to violate its provisions. I will, therefore, put such a construction on the act as will be most consistent with their duty, and the provisions of the constitution. I think the legislature did not intend to interfere with the provisions of the constitution, as it relates to the term of office. The words which it is supposed limit the time for which the governor shall appoint, until the next succeeding January, do not in themselves warrant the construction: they are these, "To hold, under such appointment, until such time as an election shall take place, according to the provisions of this act." When does an election take place according to the provisions of the act? When there is a vacancy or will be one in the month of February, in any district.—Now the very question is, is there a vacancy? Until it be determined that there is a vacancy, there can be no election. All that was meant was to hold until the regular time of election shall come round, that is the January before the four years expired. This more fully appears from an examination of the whole clause. If the legislature had given to the governor the power of filling such vacancies only as were occasioned by death or resignation, it might have been presumed that they intended him to fill up only the unexpired time; but when we perceive that he is authorized to appoint, at the "expiration of office," if the people do not, are we not led to the irresistible conclusion that they meant he should appoint for four years? As late as 1818, the legislature took this view of the subject in the case of *Moses Mathews*, who was appointed by the governor, but who had not been commissioned in time.

In the acts of that year, page 59, it is said, "and he the said *Moses Mathews*, shall be entitled to hold the said office for four years from the time of his appointment, as the constitution of this state requires." Here is a legislative construction of the constitution.

But it is contended that from the whole act of 1808, taken together, it is manifest that it was the intention of the legislature to limit the term of office when there was an appointment by the governor. If such was the intention of the legislature, and is the meaning of the act, I have no hesitation in declaring it in that particular unconstitutional; for I am satisfied that the framers of the constitution intended that the office should endure for four years, and no longer, or a shorter period of time, where the incumbent lived, or did not remove out of the state, nor was not removed from office. And the appointment of the governor could continue for one year. The incumbent might afterwards be elected for four years, and thus violate the constitution, by holding for five years, and if not re-elected, hold for one year, which would equally operate as a violation of its provisions. The arguments of inconvenience were pressed on the court, and are deserving of notice on that account, as well as because they are calculated to mislead.

It was said if the governor be allowed to appoint, for four years, it will entirely defeat the intended election by the people. If this consequence did result, it cannot prevent the court from a conscientious though unpleasant discharge of duty; but it is not correct in fact. Why not an election take place on the January preceding the determination of the incumbents term of office, as it does in those cases, where a sheriff is elected by the people? I can perceive nothing which prevents it. The elections always precede the time of the expiration of office, and may as well be so in the case of appointment. The only difference may be that the successor may come into office at some other time than the month of February, which is by no means important.

Another inconvenience urged was, that a sheriff may resign at the last moment of his term, and procure his friend to be appointed. This I do not think to be an inconvenience, for I shall always believe that the person who will fill the executive chair of this state, will not be under the influence of any man, but will act independently, and for the good of his country ; and the objection goes to the whole law, for it is clear that the power of appointment is given on resignation.

If it be desirable to restrain the exercise of this power in the governor, the legislature can do it at any moment.

This case has the support of authority also. A similar decision took place in the case of *Harley*, (1 *Const. Rep.* 267,) *Lyles and Hutson*, (*ante*, 238-240.)

The motion is therefore dismissed.

The case against *Allen Barksdale*, sheriff of Laurens, tried before me, is decided by this case. But as there is another point in that case which it may be important to determine, (to prevent its occurring again), I deem it proper to express an opinion on it at this time. The managers of the election, in that case, had returned the said *A. Barksdale* duly elected, and we have determined that their decision is final and conclusive. (*The State vs. Dellesseline*, *ante* 52.) The only question then was, whether any particular number of the managers or all of them should have signed the certificate. It is ascertained that a majority of the sitting members signed that return, which was certainly sufficient to have authorized the governor to have commissioned him for four years. His term, therefore, will expire at the regular period, in Feb. 1826, and an election may be held in the preceding January. This motion was also dismissed.

Justices *Richardson* and *Johnson*, concurred.

Justice *Nott* :

I concur in this decision, because I think the principle was decided in the case of the *State vs. Hutson*.

Justice *Huger* concurred with Justice *Nott*.

Clarke, for the motion.

Williams & Mills, contra.

STATE vs. JOHN SPURGIN.

Where a person was indicted for horse stealing, and the jury found a verdict, "guilty of petit larceny," the court *held*, that judgment of petit larceny could not be pronounced upon the prisoner; but ordered him back for trial.

Tried at Spartanburgh, Fall Term, 1821.

THE prisoner was indicted *under the act* of the legislature for horse-stealing, and the proof of his guilt was conclusive. No evidence was offered as to the value of the horse, but from his description, it was apparent he was worth but little, and the jury under the direction of the presiding Judge, found the following verdict, "guilty of petit larceny."

On the prisoners being brought up for sentence, Mr. Solicitor *Davis* moved, that sentence as for petit larceny should be pronounced upon him. The presiding Judge doubted, however, whether the prisoner could be found guilty of petit larceny on this indictment, and directed that the question should be brought up for the consideration of this court.

Mr. Justice *Johnson* delivered the opinion of the court.

The principle involved in this case, appears to me to have been distinctly settled by this court, in the case of the *State vs. Hardy Miles*, and as I think on correct principles. I am aware that there are many cases in which the party may be found guilty of an offence less than that which follows from the facts stated in the indictment; as on an indictment for an assault and battery, the jury may find the assault only. So on an indictment for grand larceny, a verdict for petit larceny is good. And the same rule applies to most offences of a compound character; and the reason is, the greater offence necessarily includes the minor, as in the cases put, every battery includes an assault, and grand, includes petit larceny; and the distinction appears to me to depend solely on the question, whether the offence charged in the indictment is dependent on some other, and

without which it cannot be perpetrated, or is of itself a substantial independent offence, or in other words, whether it is compound or simple? If the former, the jury may determine which has been committed; but if the latter, they are not at liberty to substitute another; for a single fact only is put in issue. Let us apply this distinction to the present case. It will not be denied that the legislature have the power to take away the benefit of clergy even from petit larceny, or that they have taken it away from horse-stealing, without regard to value. The fact of stealing is then the only one put in issue, the offence therefore is simple, and not compound. One case of common occurrence will be a sufficient illustration. Burglary consists in the breaking and entering the mansion house of another in the night, with intent to commit some felony in the same, whether such intention be executed or not.—(2 *Chitty, Crim. Law*, 484.) Now if the intention only be charged in the indictment, the jury can only find upon that fact; but if the execution of the intention by stealing the goods be also charged, the prisoner may be convicted of the less aggravated offence, and acquitted of the higher, (3 *Chitty*, 1099;) and for the very obvious reason, that in the first, one offence only is charged, and in the last two.

The argument opposed to this view of the subject is, that every larceny necessarily includes petit larceny, when the value of the thing stolen is more than twelve pence, and is therefore compound; and the authority relied on is (1 *Hale P. C.* 531.) The argument is already answered. The act takes away the benefit of clergy from this offence without regard to the value of the horse; and the case relied on seems to have arisen out of peculiar circumstances, and to have originated in the exercise of an arbitrary discretion, supported by a distinction too refined to be tangible, and is at war with the general doctrine on the subject; for it is expressly laid down that in this case (horse-stealing,) and some others of the same character, the value of the property need not be proved. (2 *Chitty*,

Com. Law, 741.) And I am led to the conclusion, that judgment, as for petit larceny, cannot be pronounced on the prisoner.

Growing out of this result, the question arises whether this verdict amounts to an acquittal of the prisoner, or whether he should be ordered back for trial? Some of my brethren incline to the former opinion, but I think the latter is the correct course.

I concur in the general position that no man shall be twice tried for the same offence. It is a privilege secured by *magna charta*. Its application to the present case will be best tested by inquiring how the prisoner is to avail himself of this protection, if put on a second trial? He must plead a former acquittal. Would the finding on this indictment support that plea? I think not. It is already shewn that the verdict in this case was foreign to the charge against the prisoner, and is in that view of it no verdict; and is precisely analogous to *Bostick's* case, decided in this court, when it was determined that if in the progress of the trial, the jury was broken, so that they could not pronounce a verdict, it was no acquittal, although the party had been put on his trial. So in this case, if this be no verdict, the jury were permitted to disperse without a finding on the charge against the prisoner, and does not amount to an acquittal. The case of the *Commonwealth vs. Olcot*, (2 *Johnson's Cases in Error*, 301,) is in point.

If this verdict is to be regarded as a sufficient finding as to the offence charged, it is susceptible of another view.—Petit larceny is not the offence charged, and so much of the verdict as relates to it is only surplusage, and the defendant would stand convicted of the crime charged. I think, however, the former is the correct view; but the court, under the circumstances, would, in any view of it, send the case back, as the jury might have been influenced by the direction of the presiding Judge, in finding the prisoner guilty.

It is therefore ordered that the prisoner be sent back to take his trial.

Justices *Colcock* and *Huger*, concurred.

Davis, for the motion.

——— contra.

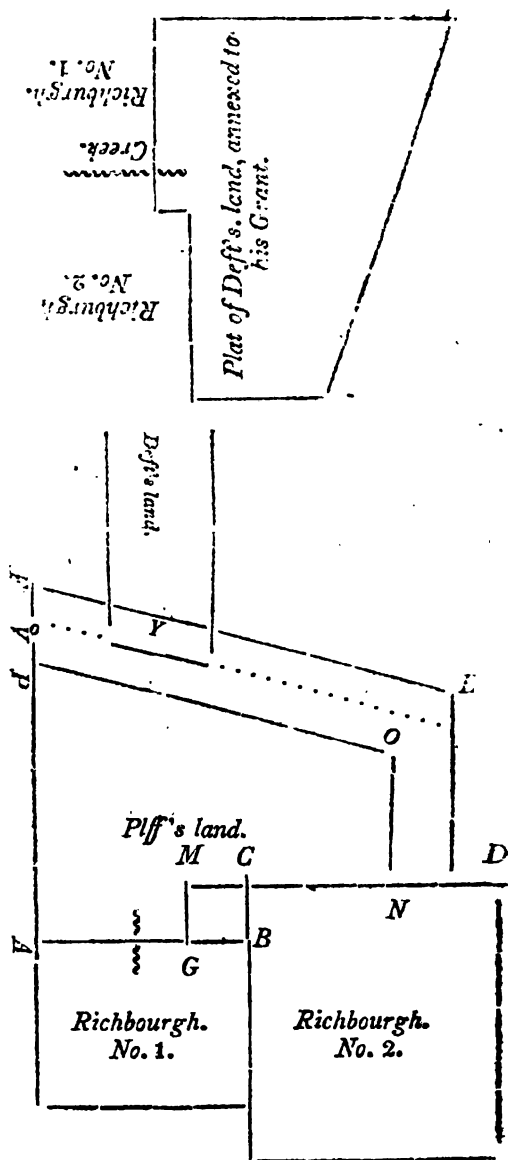
JOSEPH STOKES vs. JOHN HOLLIDAY.

Where two tracts of land join, and one projects over or beyond the other, and that projection is called for, or represented in the plat of a third tract which calls for both as a boundary, such projection shall be considered as a station, and the line shall be extended to it, although it exceed the distance called for.

Ceteris paribus lines should always be closed in the manner most favorable to the oldest grant.

THIS was an action of trespass to try titles. Tried at Sumter, Fall Term, 1821.

The whole case depended upon the manner of closing the plaintiff's lines. The question was, whether the plaintiff's plat should be closed by the lines *A. B. C. D. E. F.* or by the lines *A. G. M. N. O. P.* or whether the distance called for on the line *A. F.* should be run out, which would stop at *V.*; and then by reversing the course, close the plat at the point, which would be intersected on the line *E. D.* by a line drawn parallel to the line *F. E.*? The land in dispute was enclosed in the parallelogram *T.* and would fall within the plaintiff's line, if his plat should be closed according to the first delineation. If not, then the defendant's land would be excluded, and he was guilty of no trespass. The jury found for the plaintiff, and thereby established the line *F. E.*



Mr. Justice *Nott* delivered the opinion of the court.

The first question to be decided in this case is, whether the small offset, represented by the short line *M. G.* should be fixed at the place represented in the plat, or be extended to *C. B.* If it should be fixed at *M. G.* the distance called for in the original plat would extend only to *N.*—The plat would then be closed by the line *O. P.* and would not embrace the defendant's land. The plaintiff's grant calls for *Richburgh's* land, No's 1 and 2. Both those tracts are bounded by straight lines; but No. 2 projects over the other the distance of *C. B.* Now, we can discover no object in making the offset in that line of the plaintiff's land, except to represent that projection. I should therefore consider that a station to which the line should be extended, although it exceed the distance called for.—There is also another fact equally conclusive; the line crosses a creek which must be considered a natural station; and taking the distance from thence laid down in the original plat, it extends to *B.* I think, therefore, the line *C. B.* is well established. Taking the courses and distances from them, as laid down in the original plat, it will carry us to *D. E.* Then the question arises whether the lines shall be closed from *E.* or whether the course shall be reversed as above stated?

According to any theoretical rule of geometry, perhaps one method would be as correct as the other. But a rule of decision has long prevailed in this state, that in closing lines between conflicting grants, the method most favorable to the elder (*ceteris paribus*) should prevail, which is nothing more than a practical application of the common law rule, that a grant shall be construed most strongly against the grantor. The court are therefore satisfied with the verdict, and the motion must be refused.

Justices *Huger*, *Gantt*, *Johnson* and *Richardson*, concurred.

De Saussure & Holmes, for the motion.

S. D. Miller, contra.

SARAH MILLING, *et al.* vs. LITTLETON CRANKFIELD.

The rule of law that parol evidence shall not be admitted to explain or contradict a deed applies as well to cases involving the titles of land as to others.

Where an ambiguity in a deed has been raised by parol evidence, the same kind of evidence may be admitted to remove such ambiguity, but no further.

At a Special Court, held for the district of Fairfield, August, 1820.

THIS was an action of trespass to try titles to a tract of land, containing six hundred acres, granted to *James Thompson*. The plaintiffs proved their title, and established the location according to the annexed plat, marked *A. B. C. D. E. F. G. H. I.*—The defendant set up a claim to one hundred and fifty-one acres of the same land, under a deed from *John Milling*, the plaintiff's ancestor. The deed describes the land in the following words—"All that tract of land, containing one hundred and fifty one acres, more or less, being part and parcel of the said tract of six hundred acres so granted to *James Thompson*, situated, lying and being on the south-west side of said tract, bounded south by *Nimrod Mitchell's* land, and on the south-west by *Willson's* land, and north-west by the said *John Milling's* land, and hath such shape, form and marks as appear by the plat in the margin hereof, as well as by the plat annexed to the original grant, reference being thereunto had," &c. In the margin is a plat, resembling in size and shape, the small diagram hereunto annexed, marked *A. B. C. D.* From the corner *A.* appears a line in the manner herein represented, supposed to indicate a part of the line *A. I.* in the large plat, and intended to designate with more precision the corner *A.* From the corner *D.* is also extended a line, supposed to represent the line *D. E.* on the large plat, and intended to designate the termination of the line *C. D.* From all this evidence it appeared manifest to the court that the defendant could not hold more than was embraced within the lines *A. B. C. D.* on the large plat. The plaintiffs were willing to al-

low the defendant all the land within those lines; but he contended that he was entitled to go to the line *K. L.* and went into evidence for that purpose. The purport of the testimony, giving it the most favorable construction for the defendant, was that *John Milling*, the plaintiff's ancestor, some years before he made the deed promised to make a title to the plaintiff for all the land south of the line *K. L.* That when the defendant applied for titles, *Milling* was lying sick, and said that he could not then attend to it; but whether he lived or died, defendant could not be injured. He died shortly afterwards, leaving this deed executed, ready to be delivered to the defendant.

The witness was then asked if he did not believe that the line *A. D.* in the margin of the deed was intended to represent the line *K. L.* in the large plat. That question was objected to, and the objection sustained by the court. Other objections arose with regard to the Statute of Limitation, which it is not necessary to report.

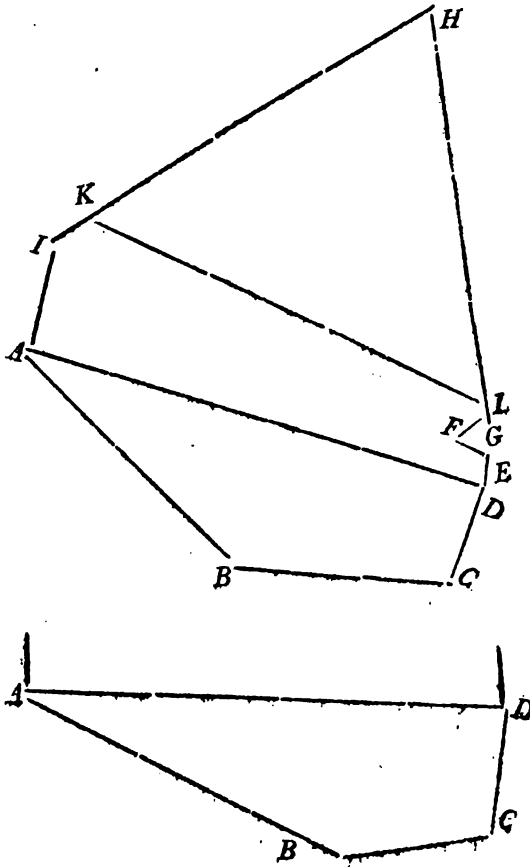
The presiding Judge instructed the jury that the only question to be determined was, whether the defendant could, according to the terms of his deed go beyond the line *A. D.* If he could not, then all the testimony relative to the line *K. L.* ought to be rejected, as it went to contradict the deed; and further, that nothing was pretended to be established by that evidence, except that the plaintiff's ancestor had promised some years before to convey to the line *K. L.*; but that amounted to nothing more than that he had not performed his promise. It did not give the defendant more than his deed called for. If, therefore, the evidence had been received, it would have proved nothing but a parol agreement or promise, which had never been carried into execution, and which could not avail the defendant in a Court of Law.

The jury found a verdict for the plaintiff, establishing the line *A. D.* as the dividing line.

A motion for a new trial was now moved for, on several grounds, of which it is only necessary to consider the two following:

1st. Because the presiding Judge refused to admit parol evidence to designate the line *K. L.* and to shew that this was the line intended to be represented in the margin of the defendant's deed of conveyance.

2d. Because the jury ought to have found the line *K. L.* proved to have been made as a dividing line by the original surveyor.



Mr. Justice *Nott* delivered the opinion of the court.

The rule of law that parol evidence cannot be admitted to contradict a deed, is so well established, that it would be a waste of time to introduce either argument or authority in its support. It is however contended, that cases involving the titles to land often require exceptions to that rule. If it is intended to say that the rules of evidence in relation to cases of trespass to try titles to land are different from what they are in other cases, the opinion is founded in error. Whenever a deed refers to any matter or thing extrinsic of the deed itself, that matter or thing must be established, or identified by parol evidence. And as that more frequently happens in land cases than any other, the rule more frequently applies. Thus for instance, when a certain course, tree, or creek is called for, parol evidence must be resorted to for the purpose of ascertaining whether they are found to correspond with the deed. And if it should refer to a hogshead of sugar, a bag of cotton, or a horse, the same rule would apply. But where the courses, distances and lines are all found to correspond with the deed, I apprehend no case can be found where parol evidence has been admitted to shew that any other was intended; and if any such case can be found, I should be disposed to say that case is not law. The case of *Middleton and Perry*, (2 Bay, 541,) is supposed to conflict with this opinion. But when that case comes to be understood, it will be found to contain no principle inconsistent with that now advanced. The defendant's grant called for land lying on "Cedar-creek, waters of *Broad* river." But no such land could be found on the waters of *Broad* river. The defendant offered to prove that the land lay on Cedar-creek, waters of the *Catawba* river, which the Circuit Court refused, on the ground that it went to contradict the grant; but this court held that the testimony was admissible, and granted a new trial. But it will be observed that the grant also called for carries line and station trees and adjacent lands by which it was bounded; all which constituted a part of the description as well as *Broad* river. So

that although the parol evidence went to contradict one part of the deed, it went to support other parts of it. And it is a well established rule of law, that when an ambiguity is raised by parol evidence, it may be removed by the same kind of testimony. Thus, if a person should, by deed, convey a tract of land to his son *John*, parol evidence might be admitted to prove that he had two sons of that name. A question would then arise which of the two was intended; and parol evidence might be admitted to determine that question. But when the parol evidence is heard, if it raise no ambiguity, it must be rejected. Then to take the case above stated. If a person should give a tract of land to his son *John*, with directions that until he should arrive to the age of twenty years, the profits of it should be laid out in other lands, and parol evidence should be offered to prove that he had two sons of that name, if that evidence should, at the same time, prove that one was over age, and the other a minor, when the deed was made, the evidence must be rejected; because, the deed itself would shew that the minor was intended, and parol evidence could not be received to prove the contrary. Now let us test the correctness of this verdict by the rules above laid down. I have already shewn that all the corners and lines of the defendant's land are found to correspond with his deed; except that it may be questionable whether he was entitled to go the whole extent of the line *C. D.* because that gives him more land than his deed calls for; but that objection should have come from the other side. It does not lie in the mouth of the defendant to complain that he has got too much, and the plaintiffs are satisfied with the verdict. Proving therefore that another line was run in a different part of the land, created no ambiguity. And even though it had been proved that the plaintiff's ancestor had committed an actual fraud, in not conveying to the line *K. L.* or that the conveyance had made a mistake, still it would not avail the defendant. He cannot hold more than is embraced in his deed. It might perhaps authorize a

Court of Equity to direct further titles to be executed; but it could not enable him to recover at law.

The testimony rejected by the court, was nothing more than the opinion of the witness with regard to the conclusion which ought to be drawn from the facts which he had proved. The province of the witness is, to state the facts, but it belongs to the court and jury to draw the conclusion. In matters of science, the judgment of the court may be aided by the opinions of scientific men. So the opinions of witnesses, when drawn from facts, which have come to their knowledge, and which cannot be presented to the view of the court, may be received; but they must also give the reasons on which those opinions are founded.— Thus if it were important to determine whether the wound by which a person came to his death was inflicted by a stick, a sword or a bullet, the opinion of a witness who had seen it would be received; but then he would be required to give a description of the wound by which the court might determine whether he had sufficient reasons for his opinion. But where the opinion of the witness is only a conclusion drawn from the facts to which he has deposed, it would be transferring the province of the court and jury to the witness to allow him to give his opinion. The witness in the case now before us was not present when the deed was made, and knew nothing of the intentions of the grantor, except what arose from the face of the deed itself. It was therefore a mere wild conjecture, calculated to lead to error, and not to ascertain the truth.

In considering this ground, I think a sufficient answer has been given to the second. I will, nevertheless, add that the extension of the lines from the points *A.* and *D.* could have been intended only as *indices* of the terminers of the defendant's claim, and in my view are conclusive of the fact. The verdict, therefore, is consistent with the evidence, and the motion must be refused.

Justices *Johnson*, *Gantt* and *Huger*, concurred.

Mr. Justice *Richardson* dissented.

Justice *Colcock* : I dissent from the determination that a new trial should not be granted.

Gregg, for the motion.

Clarke, contra.

MARTHA S. COLEMAN vs. ROGER PARISH.

A recovery in an action of trespass on lands, is a bar to an action to recover mesne profits, for use and occupation of the same land, anterior to the verdict in trespass.

THE plaintiff by her next friend brought this process against the defendant for the rent of land, for the years 1817 and 1818.

At the hearing, it was in evidence that the defendant had the use of, and planted the plaintiff's land in 1816, 1817, and 1818. The first year only under a written contract with the plaintiff's father. In this contract he agreed to give two dollars per acre for fifteen acres.

In 1819, the defendant, after notice, still held to the plaintiff's land, and she brought an action of trespass against him. To this action, the defendant made no appearance, although he gave up the land ; but at the trial he was suffered to shew that he had a possession by contract in the first instance ; and the jury, though it was charged that they might find the amount of rent due, found for the plaintiff one cent.

It was further attempted to be shewn, that defendant, after this verdict, and since the commencement of the present suit, acknowledged he had to pay for the land of the plaintiff which he had used ; but the testimony being in conclusion, Judge *Johnson* ordered a non-suit.

The plaintiff thereupon appealed :

1st. Because the verdict in the action of trespass is neither a bar to, nor satisfaction of plaintiff's claim in this case, that action being defeated by defendant's shewing

there was a contract for rent with the plaintiff's father for 1816.

2d. Because the defendant's acknowledgment that he had to pay for the plaintiff's land which he had used, is sufficient to charge him with rent for the two years for which he made no contract.

Mr. Justice *Richardson* delivered the opinion of the court.

The only question is, whether the recovery in the action of trespass is a bar to this action; and it is enough to say that this court has before decided that a recovery in trespass on lands is a bar to the recovery of mesne profits, that is, for the use and occupation of the same land, at any time anterior to the verdict in trespass.

This was decided in the case of *Lehre vs. Sumter*. The evidence of the after promise to pay, was too imperfect to be relied upon.

The motion is therefore dismissed.

Justices *Colcock*, *Johnson* and *Huger*, concurred.

Silliman, for the motion.

Miller, contra.

ENOS TART vs. JAMES CRAWFORD.

Wherever a subsequent purchaser has received explicit notice of a former conveyance, such conveyance though not recorded will be valid, legal, and effectual against the subsequent conveyance of such purchaser, though recorded in due time.

Tried before Mr. Justice *Johnson*, at Marion, March Term, 1821.

THIS was an action of trespass to try titles. The plaintiff produced, at the trial, a grant to *John Hughes*, for 386 acres, dated 5th December, 1796, also, a conveyance from *Hughes* to *John Deer*, for the above tract, dated 15th May, 1813, and recorded 18th May, 1813, and a con-

veyance from *Deer* to the plaintiff, for a part of the above mentioned tract, dated 1st March, 1818.

The trespass was proved, and the location of the land established.

The defence was then gone into.

Josiah Lewis, a witness on the part of the defendant, swore that he was the surveyor who originally surveyed the land. That although granted to *Hughes*, it was for the use of *John Smith*, who had borrowed a warrant from *Hughes* to lay on it. That the witness got the grant out of the office himself, and shortly after got *Hughes* to execute a deed, in the usual form, to *Smith*, which he delivered to him.

The will of *John Smith* devising the land to his daughter, was produced.

The same witness, (*Lewis*) further stated, that after the death of *Smith*, a man by the name of *Maloy*, who inherited from the daughter, told him that the deed made by *Hughes* to *Smith* had been destroyed by rats, and requested the witness to prepare a quit claim deed, and get *Hughes* to sign it. *Maloy*, at the same time, gave him an affidavit of the destruction of the deed. Not long after, *John Deer* applied to witness to know if he had procured this paper to be executed, and told him that he had purchased the land from *Maloy*; that he had seen the fragments of the old deed, and that it was so much mutilated as to be unintelligible, and that *Maloy* had sworn the truth about it. He then requested the witness to procure the titles to be executed by *Hughes* to himself. The witness reminded him, that *Smith*, who was his grand-father, had sold a part of the land to *Ervin*, and that it would be unjust to take advantage of the loss of the deed. He said he knew it, and that witness need be under no apprehension, he intended to act honestly. The witness procured *Hughes* to execute the deed to *Deer*, now given in evidence.

The defendant then gave in evidence a deed, signed and sealed by *John Smith*, which he contended was a deed from him to *James Ervin*, for the land, but which was

only a contract to sell, dated in 1802, and a formal deed from *John* and *Samuel Smith*, the executors of *John Smith* to *Ervin*, for the land, dated in 1802.

The present plaintiff was a witness to both these papers, and also one of *Smith's* executors, and lived in the immediate vicinity. As the will did not give the power to the executors to sell, their deed conveyed no title, and proved only that *Ervin* had complied with the condition of the contract, entered into with the testator.

The deed from *Hughes* to *Smith*, which was destroyed, had never been recorded, and it was contended on the part of the plaintiff:

1st. That the deed not being recorded, was void as to *Deer*, the subsequent purchaser.

2d. If not as to him, it was void as to the plaintiff who was a purchaser without notice.

As to the first point, the Judge charged the jury that the object of recording was to guard subsequent purchasers from fraud and imposition, and that the notice to *Deer* dispensed with the recording.

And as to the second, that the circumstances of the plaintiffs having been one of the executors of *Smith*, and necessarily conversant with his affairs, his living in the neighborhood, his having subscribed to the contract between *Smith* and *Ervin* and the deed from his executors to him, as a witness, authorized the presumption that he also had notice, and that *Deer's* having had notice he could take nothing by the deed, and could therefore convey nothing to the plaintiff.

The Jury found for the defendant.

The plaintiff moved for a new trial, upon the ground, that the presiding Judge mistook the law, in charging the jury that the notice to *Deer* of the prior conveyance of *Hughes*, the grantor, to *John Smith*, dispensed with the necessity of recording that deed; and that therefore the plaintiff, who claimed under *Deer* could take no title.

Mr. Justice *Richardson* delivered the opinion of the court.

The act of 1785, (*Grimke, P. L. 381,*) after directing how, when and where conveyances of land shall be recorded, proceeds thus ; " And if any deed or other conveyances shall not be recorded within the respective times before mentioned, such deeds, &c. shall be valid only as to the parties themselves and their heirs ; but shall be void and incapable of barring the right of persons claiming as creditors, or under subsequent purchases, recorded in the manner hereinbefore described."

The first question which arises then is, whether the conveyance of the land in question made by the grantor *Hughes* to *John Smith*, having never been recorded, is void as to *Deer*, the subsequent purchaser ?

The conveyance to *John Smith*, though not recorded, was well known to *Deer*. The object of the act of 1785, was to prevent subsequent purchasers from being defrauded in their purchases of lands by reason of prior conveyances remaining unrecorded and concealed. The important end of the act was to give notice of prior sales to subsequent purchasers, in order to keep them upon their guard, and to save them from the purchase of lands already conveyed to another person.

Whenever the subsequent purchaser has received actual notice of the former conveyance, the end in view has been answered. If, with a knowledge of the former conveyance, he will still purchase the land, he commits an act of folly or dishonesty, he must either intend to give away the consideration money, or to defraud the former purchaser of the land, which he knows to have been fairly purchased by him. To permit him to do so, would be to pervert the character of the law, and to make it an engine of fraud instead of a safeguard against it.

Whenever then the subsequent purchaser has received explicit notice of the former conveyance, such conveyance, though unrecorded, will be valid, legal, and effectual

against the subsequent conveyance of such purchaser, though recorded in due time.

This construction, though not drawn from the letter of the act, is warranted by adjudications upon similar acts.— (4 *Mass. Rep.* 637. 2 *Com.* 705. 10 *East*, 350.) And is backed and supported by arguments of convenience and policy, while its positive call upon the subsequent purchasers to reciprocate the good faith required of others for his benefit, plainly recognizes the true spirit of the act itself, and is therefore satisfactory.

The second question is, whether the notice to *Deer* will, in like manner postpone to the claim of *John Smith*, the rights of the plaintiff *Tart* under his conveyance of the land from *Deer*? In other words, is the notice to *Deer* the same as notice to *Tart*?

Here, a very different rule of great justice and convenience must govern; which is, that where a title to any property is genuine, legal and effectual upon the face of it, any secret fraud, however destructive of the title of a party to the fraud, yet such secret fraud cannot infect and weaken the title of a purchaser for valuable consideration, and of good faith, who is totally ignorant of, and without the means of discovering the fraud.

This rule has been well considered, and recognized in the cases of *Reaborne vs. Teasdale*, and *Teasdale vs. Atkinson*, (2 *Bay* 546.) In the former, the title of *Reaborne* to certain negroes was holden to be void, because fraudulent. In the latter, the same court held the same title valid when transferred to *Atkinson*, because he was a purchaser for valuable consideration, and ignorant of the fraud: though in point of fact the fraud was equally proved in both these cases. See also 10 *Johnson*, 185. 2 *Forb.* 74.

Such was the situation of *Tart*; the title of *Deer* was genuine, and in appearance legal and effectual. *Tart* had no explicit notice of the prior conveyance to *John Smith*, and had given a valuable consideration for the land. A skilfull and circumspect man would have deemed the title of *Deer* perfect. It was perfect but by reason

of *Deer's* secret knowledge of the unrecorded conveyance of *Hughes* to *Smith*. *Tart*, if he really knew this secret, would have been in the same situation as *Deer*; but his title cannot be weakened by the notice to *Deer* alone.

In this respect then, the charge to the jury was founded in mistake; and a new trial is therefore ordered, at which it may be ascertained whether *Tart* as well as *Deer* had notice of the conveyance to *John Smith*.

Justices *Nott* and *Huger*, concurred.

C. Mayrant, for the motion.

Ervin, contra.



WILLIAM SUMMERS vs. HENRY TIDMORE, Adm'r.

Where the plaintiff takes a decree against an executor or administrator, subject to a plea of *plene administravit præter*, he thereby admits that the administration has been correct up to that period. And any objection as to the non-return of any article in the inventory ought to have been made by the plaintiff on the trial of the case, and cannot be excepted to on the trial of an action, upon such decree, suggesting a *devastavit*. (*a.*)

Newberry, Spring Term, 1821.

THIS was a summary process, founded on a former decree of the Court of Common Pleas, for Newberry district, against the defendant, as administrator of *Adam Tidmore*, deceased. After deducting those expenses which are to be first paid, it appeared in evidence, from the return made by the ordinary, that the amount of estate in the hands of the administrator was \$320 65 1-2. That the debts due by the estate amounted to \$553 58. So that the assets in the hands of the administrator fell short of what would have been sufficient for the extinguishment of the debts. It appeared also that none of the creditors were entitled to priority of payment. They all stood in the same degree. The plaintiff supposing that a judgment recovered would give him preference, instituted his action against the administrator, and recovered the decree

on which the present process was founded; subject however to the plea of *plene administravit prater*. Including the costs of that suit, his proportion of the assets in the hands of the administrator amounted to \$54 43. He actually received \$57 17, being \$2 74 more than his proportion. In this action the plaintiff suggested a *devastavit* on the part of the defendant, in not having returned 300 lbs. of seed cotton, which by carelessness or mistake had been left out of the inventory.

The case was tried before Mr. Justice *Gantt*, who gave a decree in favor of the defendant.

It was now moved that the decree be reversed, and that the plaintiff be allowed to take judgment for the value of the cotton, supposed by the ordinary to be worth \$9 and for the further amount of six dollars, which remained in the hands of the administrator unappropriated.

Mr. Justice *Gantt* delivered the opinion of the court.

The 300 lbs. of seed cotton was in the hands of the administrator at the time of the decree, on which this action is founded. That decree was taken subject to the plea of *plene administravit prater*. The plaintiff has therefore admitted that the administration had been correct to that period, and any objection in respect to the non-return of this cotton in the inventory, ought to have been noticed by the plaintiff in the trial of the first action. It is now too late to say that defendant had been guilty of a *devastavit* in not having returned it at that time. It is not pretended in this case that the defendant has been guilty of any intentional misconduct. The plaintiff thinks himself entitled to the whole balance of \$16, in exclusion of the other creditors, whose claims not having been reduced to judgments are thought to be barred by the statute of limitations.

But I do not think the plaintiff entitled to any preference. He stood on the same footing with the other creditors at the death of the intestate. They were by law to be paid off in equal proportion, and the plaintiff cannot by obtaining a decree, and thereby subjecting the estate to un-

necessary costs, entitle himself to a preference over the rest of the creditors. He ought to have been satisfied with having received his full proportion and more. The defendant is at perfect liberty, in my opinion, to make an honest and fair distribution of the small amount in hand amongst all the creditors of the deceased, notwithstanding the lapse of time; and this is the unanimous opinion of the court. The motion must therefore fail.

Justices *Johnson, Richardson and Colcock*, concurred.

Oneal, for the motion.

Bausket, contra.

(a.) See *M'Dowell vs. Branham*, 2 *Nott & M'Cord*, 572. R.

JESSE TURNIPSEED VS. JOHN C. HAWKINS.

The testimony of one of the executors that he had made diligent search, and had been unable to find a deed, is sufficient evidence of its loss, without examining the other executor, to admit in evidence, a copy, dated 1778, certified by the *deputy* register, and sworn to be a true copy by a witness who had compared the copy with the record, it being also supported by the testimony of the subscribing witness that some land had been conveyed by the grantor to the grantee, about the date of the deed, and he believed this to be a copy of the deed.

An old survey, 32 years old, reciting that the survey had been made for the grantee, was admitted in evidence, and was the only act of ownership or possession proved.

The surveyor who made the ancient survey was dead, but the plat was admitted upon the testimony of a surveyor who was familiar with his works, and who swore to the similarity; though he did not know his hand-writing.

The subscribing witness swearing that he saw the testator sign, &c. and that he attested the will in his presence, "and that the other witnesses were also present, and subscribed their names in his presence and in presence of the testator," is sufficient evidence that the testator executed the will in the presence of all the witnesses.

The plaintiff claimed under a deed from executors, authorized to sell the land at public auction; the deed is sufficient without shewing that the sale had been publicly made; for the court will presume that the executors had done their duty, and had sold in pursuance of the will.

Trespass to try titles, tried at Columbia, Spring Term, 1821, before Mr. Justice Gantt.

THIS action was brought to try titles to a tract of 1000 acres of land. The plaintiff produced a copy plat and grant to *William Currie*, dated 9th June, 1775, with an affidavit of the loss of the original, under the act of the assembly. He then offered a copy of a conveyance from *William Currie* to *John Hannahan*, of the same land, dated 2d May, 1778, certified by the *deputy* register to be a true copy from the records in Charleston; and produced a witness who swore he had compared it with the recorded deed, and that it was a correct copy. The plaintiff then produced the examination of *John Moncrieffe*, who appeared by the copy deed to have been one of the subscribing witnesses to it. *Moncrieffe* deposed that he knew *Currie* and *Hannahan* well, and that about the time the copy deed bore date, *Currie* had sold to *Hannahan* a tract of land in the upper country, near Spring-hill. That the deeds were executed in Charleston, and that he believed he was a subscribing witness, and that the paper presented to him might be a copy of the original deed; that he could not swear positively that *George Lord* and *Charles Johnston* were subscribing witnesses with himself as the copy deed purported; but he thought it probable, from the fact, that *Charles Johnston* was the intimate friend of *Currie*, and attorney for him after he went to Europe in 1778.—That *Johnston* was dead, and he believed *Lord* was also. That he could not have remembered clearly the signing this deed as a subscribing witness, without some circumstances to remind him of it; but independent of seeing the copy deed, he remembered that *Currie* sold lands to *Hannahan* in the upper country about 1778.

The plaintiff then produced the examination of *William Meggett*, one of the executors of *Hannahan*, to whom with his co-executors a power was given by the will to sell the testator's lands. *Meggett* deposed "that he had made diligent search for the above mentioned deed from *Currie*

to *Hannahan*, but had never been able to find it; he believed it to be lost.

The plaintiff also proved that *Robertson*, to whom the executors conveyed the land, had made enquiries about this deed, and had always been anxious to procure it. The plaintiff then offered in evidence an old survey of this land, purporting to have been made on the 15th December, 1788, for *Hannahan* by *John Belton*, a deputy surveyor. *Belton* was proved to be dead, but Mr. *Alston*, a surveyor, deposed that the plat resembled *Belton's* surveys, which he had often seen, though he could not swear to his handwriting. Exception was taken to the admissibility of this paper, but was overruled by the court.

The plaintiff then offered the copy deed from *Currie* to *Hannahan* in evidence, but the defendant's counsel objected that sufficient evidence had not been offered of the loss of the original; that the other executors of *Hannahan* ought to have been examined; that the deed was dated in 1778, and did not appear to have been recorded until 1798, and was probably still in the register's office, where many persons leave their deeds either from carelessness or for safe-keeping, and that the register's office ought to have been searched; especially as that was the last place to which the deed was traced; that it was of dangerous consequence to admit copy deeds upon slight proof of the loss of the original, as it would enable and induce persons to conceal their deeds, and offer alleged copies when there was any thing upon the face of the original deeds which might restrict or in any manner affect their claims. And that in this case the plaintiff ought to be held to the most strict proof of the execution and loss of the deed, as neither he nor any of those under whom he claimed had ever been in possession of the land. (3 *Johns. Rep.* 300. 12 *Johns.* 198. *Phil. Ev.* 348. 2 *Cons. Rep.* 80, *Howell vs. House.*)

To this the plaintiff's counsel replied that the executor of *Hannahan* had proved that he had made diligent search, and that he could not find the deed, and that he believed it

to be lost. That the Court would presume that he had inquired of the other executors, and had searched the register's office, and in short, had done every thing which would authorize him to say that he had made diligent search. That this rendered it unnecessary to examine the other executors, or the register's office. That it was clear *Robertson* had not the deed, nor had the executors, or they would have delivered it to *Robertson*, when they sold to him. That it could not be required of the plaintiff to examine the register's office, because it was to be presumed that when deeds were recorded, they would be taken away by the owners. That they were lodged in the office for a special purpose, and when that purpose was accomplished, it was to be presumed they were taken away; and that it would not do to bottom a general presumption upon the supposed carelessness of a few individuals. The plaintiff's counsel relied also upon the great lapse of time, 43 years since the deed was executed, and 23 years since it was recorded, the death of *Hannahan* in 1804, and the minority of his children; that the existence and execution of the deed were fully proved by *Moncrieffe*, and the copy from the records; and that the court would presume a deed after such a lapse of time, especially as the survey by *Belton* for *Hannahan* in 1788, proved an act of ownership exercised soon after the date of the deed; (3 *Johnson's Reports*, 300, 304, 306,) and on the act, (*P. L.* 133,) by which it is enacted, "that the records of all grants in the office of the said auditor-general, or his deputy, and the records of all grants and deeds duly proved before a justice of the peace according to the usual method, and recorded or to be recorded in the register's office of this province, and also the attested copies thereof, shall be deemed to be as good evidence in the law, and of the same force and effect as the original would have been if produced, in all courts of law and equity."

The copy deed was then admitted by the court.

The plaintiff then produced the original will of *Hannahan*, and read the examination of *Donald McLeod*, who

proved "that he was present and saw *John Hannahan* sign, seal, publish, and declare the same as his last will and testament." And in answer to another interrogatory said, "that he subscribed the will as a witness in the presence of the testator, and that the other witnesses *M. Mackey* and *Timothy Kelly*, were also present and subscribed their names in presence of the testator as witnesses, and also in the presence of this deponent."

The defendant's counsel objected to the admissibility of the will, because it did not appear from the evidence that the testator signed the will in the presence of *Mackey* and *Kelly*, or that he ever acknowledged his signature to them. But it was answered by the plaintiff's counsel that the witness swore he was *present* and saw *Hannahan* execute his will, and that he subscribed the will as a witness in *Hannahan's* presence, and that *Mackey* and *Kelly* were *also present*, &c. which last words referred as well to the execution of the will by *Hannahan* as to *McLeod's* attestation.

The objection was overruled by the court.

The will gave the executors power to sell.

And the plaintiff next produced and proved the execution of a deed from the executors to *William Robertson*, dated 15th March, 1817, and a deed from *Robertson* to the plaintiff, dated March, 1818. The plaintiff objected to the executor's deed, because it did not appear that they had sold the land at public auction as directed by the will, but the court answered that it would presume that the executors had done their duty.

The location and trespass were proved, and the plaintiff closed.

The defendants counsel moved for a non-suit upon the grounds that the loss of the deed from *Currie* to *Hannahan* was not sufficiently proved to authorize the admission of a copy in evidence.

And 2dly. That the execution of the will of *Hannahan* in the presence of three witnesses, was not proved.

The motion was refused.

The defendant then offered in evidence a grant to *Wm.*

Busby, dated 1st February, 1808, which included the *locus*, and a deed from *Busby* to *John Lever*, dated 4th May, 1815, and *Lever* to defendant, in November, 1816. He also proved a possession in *Busby* more than 5 years.

The plaintiff replied by proof that *Hannahan* died in 1804, a few weeks after he made his will, and that some of his children were yet minors.

The court charged in favor of the plaintiff, and the jury found accordingly.

The present motion was,

1st. For a non-suit, on the ground that there was not sufficient legal evidence of the existence and loss of the lease and release from *Currie* to *Hannahan* to warrant the presiding Judge in permitting the contents or copies thereof to be given in evidence to the jury; and for a new trial:

1st. Because the presiding Judge permitted copies of the lease and release from *Currie* to *Hannahan*, not duly certified or attested, to be given in evidence to the jury, without sufficient legal proof of the execution and loss of the same.

2d. Because the presiding Judge permitted *Belton's* survey to be given in evidence to the jury, without any proof of its execution or even antiquity, although it was admitted that neither *Currie* nor any one claiming under him had ever been in possession of the land in dispute.

3d. Because the charge of the presiding Judge, and the finding of the jury, that there was a lease and release from *Currie* to *Hannahan*, was contrary to law and without evidence.

4th. Because the charge of the presiding Judge, and the finding of the jury, that *Hannahan* signed his will in the presence of three witnesses, or acknowledged his signature to them, was without any evidence.

Mr. Justice *Gantt* delivered the opinion of the court.

From the view which has been taken of this case by the court, it is deemed unnecessary to animadvert upon the first ground taken in the brief, as the court are of opinion

that the evidence objected to and relied upon as a ground of non-suit, was properly and legally permitted to go to the jury.

On the first ground for a new trial, I think myself that under the act of assembly, making attested copies of deeds as good evidence as the original would have been if produced, it is questionable whether there exists any legal necessity of accounting for the loss of the original, to sanction the admissibility of an attested copy. The act is silent as respects the loss of such original deed, and expressly declares that an attested copy shall be as good evidence as the original. But the evidence of the original deed being lost in this case, was entirely satisfactory. It was positively sworn by one of the executors of *Hannahan* that he had used due diligence to obtain it, and he believed that it was lost. It is worthy of observation too, that no one claiming under *Currie* opposed the legality of the plaintiff's title, which in every point of view, appears to have been duly and fairly obtained.

The testimony of *Moncrieffe* leaves no doubt as to the fact of sale made of this land by *Currie* to *Hannahan*, and after so great a lapse of time, the cautious manner in which this witness deposes to facts of such long standing, with his belief that he did attest the execution of the deed, and proved it, and this evidence corroborated by the attested copy itself, wherein his name appears as a witness, &c.—these concurring evidences of the loss and execution of the original, were entirely sufficient to justify the attested copy's going to the jury, as the best evidence which the case afforded, independent of the act of assembly.

On the 2d ground I would remark that although Mr. *Alston*, the surveyor, had never seen *Belton* write, yet he had often seen plats which he had made out, and the one introduced as evidence, purporting to have been made for *Hannahan*, resembled those that he had seen. Now it is very clear that one person may become acquainted with the hand writing of another, so as to be entitled to give evidence in relation to it, although he may never have seen

the party write. The clerk of a merchant may, after a correspondence between his principal and another, in relation to their mercantile transactions, kept up for such a length of time, and having access to the same, the hand writing of the other had become familiar, he would be competent to give evidence of the hand writing, although he had never seen the correspondent; and I think the principle applies with equal force here. Being a surveyor himself, Mr. *Alston* had seen many old surveys of *Belton's*, he had become familiar with his hand writing, and might give evidence of the same under the circumstances of this case in a court of justice. The two last grounds taken for a new trial, have, in the lengthy report of this case, and the comments already made, been so fully taken notice of, that I deem it unnecessary to enlarge upon what has been said. I will only add that from an attentive review of the evidence which was permitted to go to the jury on the trial of this case, I am clearly of opinion that the evidence was proper and legal, and that the defendant is not entitled to a new trial; and this is the opinion of the court.

Justices *Colcock*, *Johnson*, *Huger* and *Richardson*, concurred.

Gregg, for the motion.

De Saussure, contra.

JESSE TURNIPSEED vs. LEWIS BUSBY.

Where the actual possession of one claiming title under the statute was without the bounds of the plaintiff's grant, he could acquire no title by constructive possession to any part of the plaintiff's tract over which his prior grant run.

A title cannot be acquired under the statute of limitations, where the party to be affected by the possession had no right to sue.

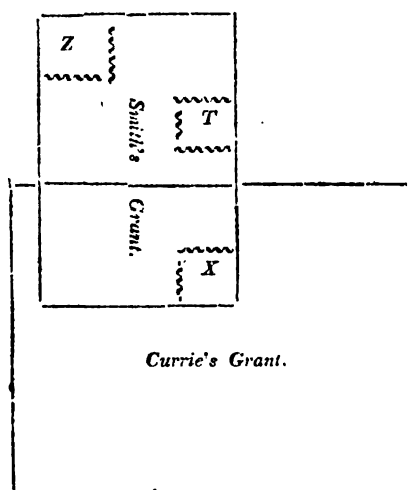
A. conveyed a tract of land to B.—B. some time after delivered up the title to A. to be destroyed, and it was destroyed; this does not revest the right in A.

An interrupted possession will not give title.

TRESPASS TO TRY TITLE.

THE plaintiff made out the same title in this case, as in the case against *Hawkins*, to which the same exceptions were taken, and in like manner overruled.

The defendant then produced a grant to *Stephen Smith*, dated 2d February, 1789, which included a part of *Currie's* grant, but the whole of it did not lie within *Currie's* grant. He then proved a conveyance to the defendant from *Stephen Smith*, dated 16th May, 1807.



Andrew Smith proved that his brother *Stephen*, the grantee, cultivated a field at *Z*. from the date of his grant to the time of the action, but never lived on any part of his grant.

Z. is not within *Currie's* grant, nor the disputed land.—*Andrew Smith* lived at *T*. 3 years under his brother; but *T*. is not within *Currie's* grant, nor the disputed land.—Then about 1st January, 1799, he went to live at *X*. which is within *Currie's* grant, and within the disputed lines.—He lived there under the grantee 4 or 5 years, then moved off and sold his crop to *Summerline*, who came and took it off, but did not live on the land. His brother *Stephen*

then conveyed the land to *Andrew*, but the conveyance was left with *Stephen*. *Andrew* then moved on the land again, and lived there one year. Then being pressed by creditors, he delivered the title back to his brother, in the presence of witnesses to be destroyed, and it was destroyed. *Busby* then went on the land under *Stephen*, who conveyed to him, and has lived there ever since.

The plaintiff then proved the death of *Hannahan* in 1804, and relied upon the minority of his children as in the other case. The defendant insisted that he had proved an adverse possession prior to the death of *Hannahan*, and that the statute having once commenced its operation, no intervening disability could stop it. The plaintiff replied that the possession at *Z.* could not avail, because it was not within *Currie's* lines, and was no trespass, so he could not sue *Smith*. And that the statute never can operate where the party to be affected by the possession cannot sue. The same of the possession at *T.*

That the possession at *X.* within the disputed part began 1st January, 1799, by *Stephen* under *Andrew Smith*; but *Stephen* did not prove that he lived there 5 years.—He then moved and sold his crop to *Summerline*, who took off the crop, but did not take possession—so the possession was broken. *Andrew* then got a title from his brother and went on again; but it is not certain that he went on before *Hannahan's* death. Suppose however he did; he remained one year, his title then was destroyed, and he went off, and *Stephen* conveyed to *Busby*; but *Busby's* possession and *Andrew's* cannot be connected, because *Andrew Smith* held for himself under title, and *Busby* held under *Stephen Smith*.

The destruction of *Stephen's* deed to *Andrew* could not change the prior rights of the parties. *Stephen* did not thereby again get title.

It was contended by the defendant that there was no delivery of the deed to *Andrew*, his brother; that it was made at a time when *Stephen* was ill, and to be considered as a *donatio causa mortis*; but *Andrew* himself said

that his brother intended him to have the land any how, whether he lived or died. His brother kept the deed, because he, *Andrew*, was from home. Besides, when they were going to destroy it, *Stephen* thought it necessary to deliver it up to *Andrew*, who then delivered it to him to be destroyed, which shewed that both regarded it as an absolute conveyance.

There was not then 5 years continuous possession proved prior to *Hannahan's* death, and the possession relied on since his death cannot be connected with that before it.—The minority of *Hannahan's* children forms then a complete protection to the plaintiff's title until 1817, when the executors sold to *Robertson*.

The case was tried before Mr. Justice *Gantt*, Spring Term, 1821, for Richland district, who charged in favor of the plaintiff, and the jury so found.

The defendant appealed on the same grounds, in relation to the admissibility of testimony thought to have been illegal, as in the former case against *Hawkins*; with the additional grounds that *Stephen Smith*, as well by himself as his tenants, was in actual adverse possession of part of the lands granted to himself upwards of five years before the death of *Hannahan*; and further that he was in like possession of a part of the land granted to himself, and also included in *Currie's* grant, upwards of five years before the death of *Hannahan*.

Mr. Justice *Gantt* delivered the opinion of the court.

The opinion already delivered in the case of *Turnipseed* and *Hawkins*, is expressive of the opinion of the court also in this case, so far as respects the evidence which was permitted to go to the jury.

As regards possession, the occupancy of a part of the land by *Stephen Smith*, included in his grant, and not constituting any part of the land claimed by the plaintiff, is not such a possession as will divest the right of the legal owner. The owner of land is only injured when a trespass is actually committed thereon. *Stephen Smith's* possession

therefore of a part of his own land would never, by any just construction of the statute of limitations, give him a title to another's land over which he had never exercised any act of ownership. As regards his possession of a part of the land included in *Currie's* grant, the evidence in relation to it, is not, in my opinion, sufficient to shew that a right could thereby have been acquired under any construction that could properly be given to the statute.

The possession first acquired was neutralized by the conveyance to *Andrew*, and there does not appear to have been any possession afterwards which could affect the claim of the plaintiff to the land which he has purchased.

It is the opinion of the court that the motion made in this case should fail, and that the verdict remain.

Justices *Colcock*, *Johnson*, *Huger* and *Richardson*, concurred.

Gregg, for the motion.

De Saussure, contra.

EVANS *ads. PARR.*

Where a decree in a Summary Process had been given against a defendant on the first day of court, upon his making the following affidavit, on the second day, the court ordered the decree to be opened, that defendant might make his defence, viz: "that on Monday morning, (which was the day on which the court sat,) a negro child, the property of the defendant had been found dead, which was supposed to have been murdered, and that that circumstance alone prevented his entering his appearance within the regular time, and that he had been informed by his counsel that he had a substantial defence."

CONSTITUTIONAL COURT

OF

South-Carolina, May Term, 1821—Charleston.

JUSTICES PRESENT THIS TERM.

ELIHU HALL BAY, RICHARD GANTT,
ABRAHAM NOTT, DAVID JOHNSON,
CHARLES J. COLCOCK, JOHN S. RICHARDSON,
 DANIEL E. HUGER.

THE STATE *vs.* JOHN ANTHONY, Sen'r.

Where an indictment commenced with "South-Carolina," and not the *State* of South-Carolina, and concluded against the peace and dignity of the "*said state*," and not against the peace and dignity of the *same*, the court *Held*, that it was good and consistent with the 2d section of the 3d article of the Constitution.

It seems to be very well settled, that an objection to the competency of a witness can be sustained only,

1st. Where he has a direct interest in the event of the cause.

2d. Where the judgment can be given in evidence for or against him in another cause.

3d. Where it has been settled by solemn decisions, that from motives of policy or expediency, he ought not to be permitted to give evidence.

The same interest which will exclude the husband will exclude the wife; but it is laying down the proposition too broad to say that the wife can in no case be a witness where the husband is incompetent. A conviction of perjury or felony will render a husband incompetent, but not the wife.

The prisoner was indicted, together with his son, for murder. The father was charged with having given the mortal wound, and the son as having been present, aiding and assisting. They were tried separately; and on the trial, first, of the father, the court *Held*, that the wife of the son was a competent witness; for both being charged as principals, one may be tried and convicted, and the other acquitted.

Murder. Tried at Barnwell, Fall Term, 1820.

THE prisoner was indicted, together with his son, *John Anthony, jun.* for the murder of — *Morgan*. The father was charged with having given the mortal wound, and the son as having been present, aiding and assisting. The commencement or style of the indictment was, "*South-Carolina*," and not, "*The State of South-Carolina*," and it concluded against the peace and dignity of the "*said state*," and not against the peace and dignity of the "*same*."

At the request of the prisoners, they were allowed to be tried separately.

The prisoner at the bar was first tried, and convicted of the murder.

In the progress of the trial, the wife of *John Anthony, jun.* was offered as a witness for this defendant; but was rejected by the court as incompetent.

A motion was now made to arrest the judgment, on the ground that the style and conclusion of the indictment were not conformable to the requisitions of the constitution; and if that motion should not succeed, then for a new trial on the grounds:

1st. Because the wife of *John Anthony, jun.* was not permitted to give evidence for the prisoner at the bar.

2d. Because the verdict was contrary to evidence.

Mr. Justice *Nott* delivered the opinion of the court.

The clause of the constitution on which the motion in arrest of judgment is founded, is in the following words: "The style of all processes shall be, *The State of South-Carolina*." All prosecutions shall be carried on in the name and by the authority of the State of South-Carolina, and conclude "*against the peace and dignity of the same*." On this ground a majority of the court entertain a different opinion from the view which I have taken of the subject; I shall therefore merely observe, the opinion of the court is, that the form of the indictment substantially

comports with the provisions of the constitution, and that the motion must be refused.

On the first ground taken for a new trial, it is the opinion of the court that the motion must be granted. It seems now to be very well settled that an objection to the competency of a witness can be sustained only,

1st. Where he has a direct interest in the event of the cause.

2d. Where the judgment can be given in evidence for or against him in another cause.

3d. Where it has been settled by solemn decisions that from motives of expediency or policy, he ought not to be permitted to give evidence.

With regard to the first, the interests of a husband and wife are considered as so identified as to render them inseparable; the same interest, therefore, which will exclude the husband, will exclude the wife also. But it is laying down the proposition too broad to say that the wife can in no case be a witness where the husband is incompetent.— A conviction of perjury or felony will render a husband incompetent; but that would not affect the competency of the wife. I can perceive no such interest in this case as should exclude the testimony of the wife. The defendants are both indicted as principals. The husband was not then on trial, and the event of this would not necessarily have any influence on the decision in his case. Whatever bias therefore it might be supposed she was under, would only go to her credibility, and not to her competency. It is true the prisoner at the bar is charged with having given the mortal wound, and her husband as only aiding and assisting; he is nevertheless a principal, and might be tried and convicted, although this defendant had never been taken, or should be acquitted. (*Plowden*, 100, *Gytin's case*. 1 *H. P. C.* 437. *The State vs. Rochelle and Fly*, Columbia, — Term, 18—)

Where several are engaged in committing a murder, it is not material which gave the mortal blow; for where one is charged with having given a mortal blow, and others

as having been present, aiding and assisting, and it comes out in evidence that he who is charged with having given the mortal wound was only present aiding and abetting, and that the stroke was given by another, the indictment is well supported; for it is in law the stroke of all. (1 *Hale*, P. C. 437. *Plow.* 98. 9 *Co. Rep.* 67, *McNally's case.*)

It seems to follow from this view of the subject, that judgment in one case could not be given in evidence in the other. For both being principals, and each individually responsible for the part which he took in the transaction, the conviction or acquittal of one could be no evidence of the guilt or innocence of the other. The principle of policy which prohibits the wife to be a witness for or against her husband, can have no application to this case; for the husband had no interest in the event of the cause then before the court. The motion being granted on this ground, supersedes the necessity of expressing any opinion on the evidence.

Justices *Johnson* and *Richardson*, concurred.

Justice *Colcock*: I dissent in this; I think the witness was not competent.



THOMAS and WM. JACKSON vs. JAMES WATTS.

Assumpsit, \$499 37.

THE SAME, and T. and O. WATSON vs. JAMES WATTS.

Process, \$70.

Tried before the City Court of Charleston, May Term,
1820.

An affidavit stating the defendant to be indebted to the agent as attorney for the plaintiff, is a sufficient affidavit to hold the defendant to bail in an action by the plaintiff.

Where the plaintiff sold the defendant \$1553 02 worth of cotton bagging, and upon the defendant's refusing to comply with the contract, had the bagging sold at auction, which produced \$1053 65, and brought his action for \$499 37, the difference, the court *Held*, that the plaintiff was within the jurisdiction of the City Court, which extended to \$500; though it was objected that the plaintiff by his own showing, was not within the jurisdiction; as he ought to have

brought his action for the whole amount of the purchase money of the bagging. The court also *Held*, that the re-sale of the goods by the plaintiff at auction was not a rescission of the contract with the defendant; but that he could still maintain his action for the difference.

After the defendant had agreed to purchase a quantity of cotton bagging from the plaintiff, he was told it remained in the plaintiff's store subject to his risk, whereupon he ordered and had some of it turned out of the store, which he afterwards returned, and then refused to take any part of it, the court *Held*, that it was a sufficient delivery under the 17th section of the Statute of Frauds.

FROM the report of the honorable Judge *Drayton*, Recorder of Charleston.

"No argument was made before me in the latter of these cases, but I believe it was intended by the counsel that the decision in the first case should govern both.

In the first case, the statement was, that Mr. *John Haslett*, the agent of the plaintiffs, sold to the defendant a quantity of cotton bagging for the price of \$1553 02. After the sale and delivery, the defendant refused to take the bagging; in consequence of which, the agent gave notice to the defendant that if he did not, within a specified time call and take away the goods they would be sold at public auction on his account and risk. The defendant never called or sent for the bagging, which, according to the notice, was sold at public auction; and produced, deducting commissions and incidental expenses, the sum of \$1053 65. For the difference between this sum and \$1553 02, being 499 37, this action was brought, it being the amount of the loss alleged to have been sustained by the plaintiffs through the failure of the defendant to comply with his contract.

Mr. *Jones*, a clerk of Mr. *Haslett*, said, that about the 8th of February, 1819, the defendant purchased the cotton bagging alluded to, and also some linens; that the linens were taken away by the defendant, but not the bagging, the defendant saying, it wanted width according to the agreement; that when this objection was made, Mr. *Haslett* was not present, that the witness repeated to Mr.

Haslett the objection of the defendant as to the bagging; after which, *Mr. Haslett* requested the witness to call upon the defendant and receive payment for him for the linens and bagging. He called upon the defendant, who asked whether the whole business would be settled if he paid for the linens? To which the witness said, he supposed so; acting from his own discretion, and not by the authority or sanction of *Mr. Haslett*. The defendant then promised to call upon *Mr. Haslett* to deliver him a check for the linens, and to take his receipt. The defendant and himself went together to *Mr. Haslett's* store.— After offering a check for the linens, the defendant said, now the business is all settled; but *Mr. Haslett* replied, by no means; you must pay for the bagging. The defendant went away in the company of the witness. Upon the way, the defendant told the witness if he would give him a receipt for the linens, he would pay for them. A receipt was given for the linens, and their price received from the defendant. The witness was present when *Mr. Haslett* and the defendant were bargaining about the bagging, when, after a great deal of discussion, he heard the defendant say he would give for it thirteen cents. Before the contract, the defendant looked at and examined the bagging. Nothing in his hearing was mentioned about the width. Between the date of the contract between *Mr. Haslett* and the defendant, and the refusal of the latter to take it, cotton bagging was getting duller and duller.— When the bagging was sold, the witness thought it cheap, and below the market price. The nature and conditions of the contract appeared to the witness to be perfectly fair and well understood, and that the defendant was a very cautious man, and long in making a bargain. Upon being cross examined, *Mr. Jones* said, that in selling cotton bagging, the common practice is to take the description from the invoice, and the purchaser examines it, and that the invoice and the article, sometimes, though rarely, differ.

Mr. Bryan, a clerk of *Mr. Haslett*, stated, that he fre-

quently saw the defendant with Mr. *Haslett*, that he heard him several times enquire about cotton bagging; that after a good deal of discussion, the bagging was offered at 13 cents. The defendant said he would reflect upon the price, and afterwards called and agreed to take it at that price. The witness rendered in the bill to the defendant, and told him the bagging was in the store at his risk.— The defendant was very often in the room where the bagging was before he agreed to buy it, was a very prudent, cautious man, not likely to buy without examination, and 13 cents was a fair price for it. By the desire of Mr. *Haslett*, the witness notified the defendant, that if he did not call and take away the bagging, it would be sold at public auction at his risk. Pursuant to the notice, the bagging was sold at public auction, on account and risk of the defendant. The witness thought, but was not positive, that between the periods of the contract and the defendant's refusal, two or three brigs arrived with bagging.— Upon being cross examined, Mr. *Bryan* said, that some of the bagging was better than other parts of it. It was of two or three qualities. The defendant never objected to the quality. Some of the bagging measured forty, some forty-one inches, more or less than forty inches. The defendant, after the contract, came to Mr. *Haslett's* store, and said he would take the bagging, and ordered it to be turned out; some of it was turned out according to his order, and carried as far as the pavement before the door; he said that before the whole of it was turned out, the defendant objected to receiving it, alleging he had bought it for forty inches, and it was not so. The witness had delivered the bill to the defendant, before he ordered the bagging to be turned out of the store.

Mr. *Haslett*, the agent of the plaintiffs, swore, that the defendant was a long time bargaining about the cotton bagging before he agreed to take it; that he was tired of his repeated offers, and that at last the defendant said, he would give 12 1-2 cents for it. The witness answered he would consult his principals, who were upon the spot.

He did so, and replied he would take 13 cents, at which price the defendant accepted it. The witness was never asked about the width. During the negotiation, the defendant went into the room where the bagging was, with a yard stick, and remained there some time. He examined the bagging during four or five days. The witness never sold the bagging for any particular width, but shewed to the defendant the invoices which described it as being of 40 inches. The bagging belonged to the plaintiffs in certain proportions which he described. The account annexed to the writ was a correct one. When the bagging was sold to the defendant, the price was very low, less than the sterling price. The witness had measured the bagging, some of which was more than 40 inches, and some a little less; some of it 41 inches, but the whole averaged more than 40 inches. He stated that bagging invoiced at 40 inches is never expected to be all of that width; it will vary. Between the contract and refusal of the defendant, some vessels arrived with bagging, which rendered the market for it dull, and finally lowered its price. Upon the defendant's declining to take the bagging, the witness proposed to refer the matter to two merchants, which the defendant refused. The witness received from the vendue-master, \$1053 65, leaving a balance due to the plaintiffs of \$499 15. The sale by the vendue-master was for cash. Some of the bagging was turned out of the witnesses store by the defendant's order, at which time the witness considered it to be the defendant's, and would have permitted him to carry the whole of it away without the money being paid; but that afterwards the witness would not have delivered it without the money. The bagging which had been turned out by the defendant's order, stood before the door of the witness until after dark. The bagging sold by the vendue-master produced different prices, the witness having made out his account from the account of the vendue-master and his own books. The bagging was sent to vendue nearly a month after the conclusion of the contract. It is customary when a purchaser does not com-

ply with the terms of a sale, to sell the goods at vendue, and to call upon the purchaser for the difference; deducting commissions and expenses, for which the purchaser is liable.

Mr. *Mill*, called by the plaintiffs, said, that he bought some of this cotton bagging at vendue; that some of it was inferior, that he bought it low, having given for it from 9 1-2 to 11 1-2 cents. At the time he bought, good cotton-bagging was selling for 17 cents.

Caldwell, a vendue-master, said he sold the bagging in dispute, on the 8th of March, 1819, by the order of Mr. *Haslett*, on the account and risk of the former purchaser; that the gross sales, (including the parcels belonging to the plaintiffs, in both these suits,) amounted to \$1436 28. He understood the custom to be as stated by Mr. *Haslett*, where a purchaser refuses to comply with the terms of the sale; but knew no instance of its having been done.

Messrs. *Heriot & Miller*, called by the plaintiffs, both said that they had seen the bagging bought by the defendant; that they had measured some of it, and that some of it was a little more, and some a little less than 40 inches, and that they would have bought it for bagging of 40 inches. They also both said that they had understood the custom, where a purchaser failed in his contract, to be as represented by Mr. *Haslett*, but neither of them knew of any instance.

The evidence having closed, the defendant's counsel moved for a non-suit, upon three grounds:

1st. Because by the plaintiff's shewing, his cause of action was not within the jurisdiction of this court; as he ought to have brought his suit for the whole amount of the purchase money of the bagging.

2d. Because no delivery of the articles purchased had been proved.

3d. Because by a sale of the bagging at auction, the plaintiffs rescinded the contract between themselves and the defendant, and therefore they cannot sustain this action.

1st. Upon the first ground, which I (the Recorder) overruled, I said that from the evidence, it appeared that the plaintiffs claimed from the defendant an amount which was within the jurisdiction of the court, and that this amount did not constitute a part, but the whole of their demand. I therefore could perceive no ground upon which the objection to the jurisdiction could be sustained.

2d. In support of this objection, the defendant relied upon the 17th section of the Statute of Frauds, and upon several adjudicated cases, to shew that there had not been in this case a legal delivery. The statute says, that in a contract like this, the parties shall not be bound, except "the buyer shall accept part of the goods sold, and actually receive the same," &c. The evidence, (which in the discussion of this motion must be taken with every necessary inference against the defendant,) shews that the goods were considered as delivered to the defendant, that he acted upon such delivery, that he had measured the bagging, that after being told it remained in Mr. Haslett's store, subject to his risk, he ordered and had some of it turned out, which he afterwards returned, and then refused to take any part of it, alleging that the width was not according to the agreement. If the goods were such as the contract required, the statute, I thought, had been fully complied with. It was not necessary, according to many authorities, that there should have been an actual corporal delivery. It was sufficient if the article was considered as bought and sold; that it was in a situation subject to the order of the purchaser, and that some act had been done amounting to a delivery, or to a symbolical delivery of it. These things appeared to me to have been established by the witnesses.

I then commented on the cases relied upon by the defendant's counsel. The case of *Kent vs. Huskinson*, (3 Bos. and Pul. 233,) determined that there had been no delivery; because it was not proved that the terms of the agreement had been complied with by the seller, on the contrary, the reverse was fairly inferable; therefore the ac-

ceptance was deemed incomplete. In the case before us, the testimony, without any contradiction, shewed that the goods answered the description, even according to the defendant's own statement of it.

In the case of *Bennet vs. Hull*, (10 Johns. 364,) there was nothing like a delivery, actual or constructive. *Rondeau vs. Wyatt*, (2 H. Bl. 63,) is to the same effect, so far as it is applicable; but the gist of the cause was altogether different. *Cooper vs. Elston*, (7 Term. Rep. 14,) is merely upon the general principle contained in the Statute of Frauds.

None of these cases describe what does or does not constitute a delivery; therefore they do not illustrate the present inquiry. This ground was overruled.

3d. The position contained in this objection I thought correct. After having sold the goods at auction on account of the purchaser, the plaintiffs could not recover against him the price of the goods sold. Had this been such an action, in my opinion it could not have been maintained; but it was not so: the suit was instituted to recover from the defendant a sum of money, because by his act in not performing his contract, the plaintiffs had been damnified.

It was further contended that the plaintiffs had no right to make the sale at auction, that his doing so was unauthorized and illegal, and that his only proper course was to bring an action of assumpsit for the price of the commodity sold. I did not think that the testimony was sufficient to establish the existence of a custom prevalent in this state, to sell goods at public auction on account and risk of the purchaser, where he had refused to comply with the terms of the contract. If usage was not to be relied upon, the question was, whether this act was a legal one? No case was cited to shew that this mode could not be resorted to; and I was unable to discern any reason why it should not be. The purchaser could prevent any sacrifice by observing his agreement; if he did not, where the contract, as in this case, was for cash, would it

be an adequate remedy to sue for the purchase money?— Would not this, in some cases, be hazardous ; as between the sale and the recovery, the defendant might become insolvent, and the goods, upon which the seller had a lien, might have become deteriorated, or if of a perishable nature, valueless ? I was under a conviction that authority existed, which warranted this mode of procedure, but my memory did not enable me to cite the case. Since the trial I have found it in 5 *Johns. Rep.* 395, the case of *Sands and others vs. Taylor and others*. I did not think that the power given by the act of Assembly of 1785, to re-sell, where the terms of sale, at public auction, were unfulfilled, necessarily implied that this power was limited to such sales. The act might have been *declaratory* of the common law, or the clause might have been inserted for the purpose of regulating the mode and manner of such re-sales, in order that purchasers might not be surprised.— This objection was therefore overruled.

The case was then argued before the jury, when the defendant's counsel insisted :

1st. That there had been no delivery.

2d. That the plaintiffs had no right to sell the goods at auction in the manner in which they did ; and if they had this right, that the defendant was not liable for the commissions, &c. of the vendue-master ; but, that at all events, he ought to be credited for the gross sales.

I summed up the evidence to the jury, and stated to them that I thought the plaintiffs had made out their case ; that in my opinion a sufficient delivery had been proved ; that the plaintiffs had a right to sell the goods at public auction, under the circumstances which the jury had heard, and that if they had this right, the expenses of the sale ought to be borne by the defendant.

The jury found a verdict for the plaintiffs.

Previously to the discussion of this case, a motion was made to cancel the bail-bond, upon the ground, that the

affidavit set forth a debt due to another person than the plaintiffs.

The motion was overruled.

A notice was served upon me, that a motion would be made for a non-suit, on the grounds,

1st. "That the cause of action is beyond the jurisdiction of this court."

2d. "That no delivery and acceptance of the goods were proved, sufficient to satisfy the provision of the 17th section of the Statute of Frauds."

3d. "That the resale of the goods by the plaintiffs was a rescission of the contract by them, and they can now maintain no action against the defendant."

"Should the constitutional court refuse a nonsuit, a new trial will be moved for, on the ground, that as the plaintiffs constituted themselves the agents of the defendant, against his consent, they are entitled to make no charge against him under this assumed agency; and therefore the defendant was entitled to credit for the gross amount of the sales at vendue, made by order of the plaintiffs. And the constitutional court will be further moved to cancel the bail-bonds in these cases, on the ground, that the affidavits on which the bail-bonds are founded, are made of a debt due to another person than the plaintiffs."

Mr. Justice *Nott* delivered the opinion of the court.

With regard to the motion to discharge the bail, a majority of the court are of opinion, that stating the defendant to be indebted to the agent as attorney, is merely shewing that he became indebted to the plaintiffs through him, or became indebted to him for their use, which enabled them to bring the action; that the objection goes more to the form than the substance of the thing, and ought not therefore to be supported.

On the question of jurisdiction, I concur with the Judge below. There is no distinct evidence by which the jurisdiction can be marked. of any greater damages being sustained by the plaintiffs than the difference between the first

contract and the sale at auction. And even if they might have recovered more, they were at liberty to demand less. The sum sued for is clearly within the jurisdiction of the court. This motion, therefore, cannot prevail.

The two remaining are the most important questions.—The Statute of Frauds says, the parties shall not be bound, "except the buyer shall accept part of the goods sold, and actually receive the same," &c. The object of the Statute was (as it professes) to prevent frauds and perjuries. The mischief to be apprehended was that incoherent and imperfect contracts might be established on loose declarations against the real intention of the party to be made liable. It therefore requires some unequivocal act of consummation to be done which cannot be mistaken. The Recorder reports to us "that after being told, it remained in Mr. Haslett's store subject to his risk; he ordered and had some of it turned out, which he afterwards returned, and then refused to take any part of it." I think that may fairly be construed into such acceptance, and receipt of the goods as was contemplated by the Statute. When we consider the course of trade in this country, a different construction would be destructive of all confidence, and lead to incalculable mischief. A waggon or boat load of cotton or flour is brought to a merchant's door, or to the wharf for sale; a purchaser presents himself, examines the cotton, and probes the flour barrels to the bottom, he then agrees upon the price, and orders the article to be laid at his door or upon the wharf, as the case may be. Shall he, after giving the seller all this trouble, capriciously refuse to carry his contract into effect? Such a construction would render the Statute subservient to the very mischief which it was intended to prevent. I think, therefore, that there was sufficient evidence of acceptance and receipt of the goods to authorize the verdict.

The last is the most difficult question. I do not find any case authorizing such a course of proceeding, except the case of *Sands and others vs. Taylor and others*. (5 Johns. Rep. 395.) But there do not appear to be any cases di-

rectly opposed to it; nor do I perceive that it violates any known principle of law. Some respect is due to the testimony of the witnesses, who said that such was the usage in Charleston, although they could not mention any particular case where it had been done, and although it might not be sufficient to establish such usage. Goods might in such a case be declining in value, or perishing in the hands of the seller, if of a perishable nature. I think, therefore, it was a course of proceeding equally beneficial to the seller and the buyer, and one that ought to be supported. Upon the whole, I am satisfied with the opinion of the Recorder, for the reasons which he has given, and with the verdict of the jury who found according to his directions.

The motion for a new trial is therefore refused.

Justices *Gantt*, *Johnson* and *Huger*, concurred.

THE CITY COUNCIL OF CHARLESTON, Assignee of the
SHERIFF OF CHARLESTON, vs. THOMAS W. PRICE.

In an action upon a replevin bond, the same proof is not required as in the action of replevin; to-wit, that the defendant was the tenant of the plaintiff, at a particular rent, &c.; for the judgment in replevin is conclusive in this.

The assignee of a replevin bond may bring an action upon it in his own name.

It seems that all the English Statutes down to 11 George 2, chap. 19, inclusive, in relation to replevin and distress, though not made of force by any statutory provisions, have been adopted in practice in this state.

The return of the sheriff is good, although it does not appear to have been sworn to; equally so where it has been sworn to by the deputy sheriff, but not signed by the sheriff.

That the goods distrained and replevied had not been regularly appraised according to the act of the legislature, is an objection which ought to have been made in the action of replevin, and cannot be taken in an action on the replevin bond. The former judgment concludes the party.

This was an action on a Replevin Bond, tried in Charleston, Spring Term, 1820.

THE circumstances of the case were as follows :

The City Council of Charleston had caused certain goods of *John Barron* to be distrained for rent in arrear. He procured a writ of replevin to be issued ; at which time he gave the bond in question, with the defendant as security, to prosecute the replevin to effect, &c. Having failed in his action of replevin, a writ of *Retorno habendo cum fi. fa.* was issued against him. On that writ was indorsed, "*Elongata* as to goods, *nulla bona* as to costs." The return was not signed by the sheriff, but was sworn to by the deputy, in whose hands the writ had been placed. The replevin bond was then assigned by the sheriff to the city council, and this action commenced upon it, and judgment obtained against the security. Various grounds of defence were taken in the court below, which were now made the grounds of a motion for a new trial.

Mr. Justice *Nott* delivered the opinion of the court.

It is unnecessary to notice all the grounds made in this case for a new trial in the form in which they are presented in the brief. They are in substance as follows :

1st. That the defendant had a right to require the same proof in this action as was required in the action of replevin against the principal ; to wit, that he was a tenant of the City Council at the yearly rent of \$ 700.

2d. As there is no act of the legislature authorizing replevin bonds to be assigned, the action could not be brought in the name of the City Council.

3d. The return of the *Retorno habendo cum fi. fa.* was not regularly made, or rather, that there was no return.

4th. The goods distrained and replevied had not been regularly appraised according to the act of the legislature.

The first ground is not supported by any authority. The question whether *Barron* was tenant and in arrear for rent due the City Council, were tried in the action of replevin, and the judgment in that case was conclusive in this. The bail to an action might as well require the

plaintiff to shew that the debt for which he had recovered judgment against the principal was just, as the security to the replevin bond require the landlord to retry the question whether there was any rent in arrear, in an action on the bond.

The second is a question of more importance.

At common law no chose in action was assignable. But that was on the mistaken notion that it was maintenance. That idea however has long ago been exploded, and courts of law have for many years respected the rights of assignees of bonds. But under the old maxim, that they were not negotiable, the assignment has been considered only in the nature of a power of attorney, authorizing the assignee to make use of the name of the obligee for the recovery of the money, and not to sue in his own name. But that is a mere matter of form, which, since the reason has ceased to exist, has constantly been giving way to a more correct view of the subject, until bonds of almost every description have become assignable, and the assignees allowed to bring actions in their own names. By the Statute, 4 Ann, ch. 6, bail bonds, and by the Statute 11, George 2d, ch. 19, replevin bonds are permitted, and may be required to be assigned.

By the Act of Assembly of this State, 1798, the assignees of all bonds for the payment of money are permitted to bring actions in their own names. The same privilege is allowed by other acts of the Legislature in other cases of assigned bonds. In the case of *Peck and Glover*, the court held, that the assignee of a bond given to keep the prison bounds under the act of 1788, by a person arrested on mesne process, could not maintain an action in his own name. (1 *Nott & McCord*, 582.) But that was a bond given for the indemnity of the sheriff, in which the party had no interest. This is a bond given exclusively for the benefit of the party. The condition of it is, that if he fail to prosecute his replevin to effect, he shall return the goods, and if they are insufficient to pay the rent, he will pay the same, together with all costs, &c. It is intended to enure

to the benefit of the landlord. Every reason, therefore, which can be assigned for permitting the assignee of any other bond to sue in his own name, operates with full force in favor of this. The only obstacle then is a mere technical rule of law unsupported by reason, and which, at most, goes only to the form of the action. And the question is, whether we can, in furtherance of justice, get over that mere matter of form? I am willing to admit that the forms of law constitute so much of the law itself that we ought to be cautious how we depart from them. But whatever might have been the common law with regard to replevin, it has undergone so many alterations by various Statutes in England, that it may now be considered almost as a statutory process. And although I am not aware that any of those Statutes have been directly made of force in this state, except the Statutes 2, *William & Mary*, ch. 5, and 8 *Ann*, ch. 14; yet I believe that with the exception of the Statute 11, *George 2*, ch. 19, they have all been adopted in practice. I say with the exception of the Statute of *George the 2d*, if indeed that is an exception. (*Solomon vs. Harvey and Briggs*, 1 *Nott & McCord*, 81.) But I am disposed to think that the practice of assigning replevin bonds in this state has arisen under that statute. Judge *Grimke*, in his *Justice of the Peace*, 165, says, "It is the usual custom of this country to grant a replevin, although there is no law in force directing the same to be granted in case of distress: and the sheriff usually conducts himself in the same manner as the sheriff is directed by 11, *George 2d*, ch. 15; which, however, is not of force here." And after pointing out the method of proceeding, he concludes with saying, "the sheriff shall assign such bond to the avowant, or person making consuance;" which appears to be direct authority for the practice for more than thirty years. If it had its origin under the act of assembly of 1798, it ought now to be considered as evidence of the cotemporaneous construction of that act, in relation to such bonds. But whatever may have been its origin, it appears to have been of long standing, and to be univer-

sal in practice. And although I cannot learn that there has ever been any direct decision on the point, yet it appears to have been tacitly acquiesced in by our courts.— (*Graves ads. Belser*, 1 *Nott & McCord*, 125.) If it were now for the first time attempted to be introduced, or if it went to invade any radical principle of common or Statute law, I should be of opinion that it ought not to be allowed. But I think a practice which has so long prevailed, and one which relates alone to the form of proceeding, and that calculated to promote the ends of justice ought now to be supported.

The question made in the third ground, has been settled in the case of *Graves ads. Belser*. (1 *Nott & McCord*, 125.) The two cases are precisely alike, with the exception in favor of this case, that the return was sworn to by the deputy sheriff. It is important that the decisions of this court should be uniform; the decision in that case must therefore govern this.

The fourth objection has come too late: if it could ever have availed the defendant, it should have been taken in the trial of the replevin. He is now concluded by the judgment in that case.

I would further observe, in answer to all the objections that none of them were taken at an early stage of the proceeding. It was not until the party had availed himself of all the delay to which the whole progress of the cause could entitle him, and after the testimony was closed, that he made an objection. And then in the argument to the jury, these exceptions were taken. The court is never much disposed to turn a party round at that stage of a cause, where substantial justice appears to be done, upon grounds which do not go to its merits.

The motion is refused.

Justices *Johnson*, *Huger*, *Gantt*, and *Colcock*, concurred.

ETIENNE FORRETIER vs. the Attaching Creditors of JOSEPH GUERRINEAU.

Upon the trial of an issue between the garnishee and attaching creditors of the absent debtor, as to the right to certain property attached, the wife of the absent debtor cannot be admitted to give evidence.

The court, also *Held*, that on the trial of the issue, in which the garnishee stood as plaintiff, and the creditors as defendants, that an order could not be granted to strike one of several such attaching creditors off the record in order to make him a witness for the others; although he assigned over the judgment which he had recovered against the absent debtor to a third person, who gave him a release.

THIS was a feigned issue made up to try the question, whether certain goods which had been attached by the defendants were the goods of the plaintiff in this issue, or belonged to *Joseph Guerrineau*, who was absent from and without the limits of the state?

Several creditors, among whom were *Brown & Moses*, merchants, had issued attachments against the estate and effects of the said *Guerrineau*. On this attachment, the sheriff made a return, that he had attached certain goods, wares and merchandizes, of which he returned a schedule; and also several negroes, &c. : and also, that he had served a copy of the said attachment on the plaintiff in this issue, with the usual notice thereon indorsed.

To this attachment, the garnishee, the plaintiff in this issue, returned that he had purchased the stock in trade of the said *Guerrineau*, without specifying any particular articles; that he had paid him five thousand dollars in cash, and had given his bond for two thousand six hundred dollars, &c. ; and then concludes with saying, that "he has not in his possession any of the goods, chattels, monies, debts or books of account belonging to the said *Joseph Guerrineau*."

With this return, the attaching creditors acquiesced and proceeded to take their judgments against the absent debtor.

The garnishee, however, came forward and made the following motion :

Etienne Forretier vs. the Attaching Creditors of Joseph Guerrineau.

On motion of Mr. *John B. White*, attorney for the plaintiff, it is ordered, that an issue be made up forthwith to try the right of property in and to the goods and chattels, rights and credits, wares and merchandizes which have been attached by sundry creditors of the said *Joseph Guerrineau*, and taken into the hands of the sheriff of Charleston district, and held by him by virtue of the said writs. To which is added, a further order, that the said defendants do plead to the said declaration within ten days, &c.

It also appeared that the attaching creditors did come in, and *Brown & Moses* among the rest, and put in their plea, on which issue was joined.

When the issue was called for trial, a motion was made to strike out the names of *Brown & Moses* from the record in this issue, and permit them to give evidence in this case. That was objected to, but upon their assigning over the judgment which they had obtained against *Guerrineau* to Mr. *Matheson*, and taking a release from him, the motion was granted.

On the other hand, the wife of *Guerrineau* was offered on the part of the plaintiff, but was not permitted to be sworn.

The defence set up by the creditors against the claim of *Forretier*, was, that the transfer to him was merely colourable, and intended for the purpose of defrauding his creditors.

On the trial of the issue, a verdict was found for the defendants. And this was a motion for a new trial.

Mr. Justice *Nott* delivered the opinion of the court.

This is a motion for a new trial, on the following grounds :

1st. Because the court permitted *Brown & Moses* to be

stricken out of the record, and to give evidence on the trial of the issue.

2d. Because the wife of *Guerrineau* was not permitted to give evidence.

3d. Because the verdict is contrary to evidence.

In order to a correct decision of the first question, it is necessary to look at the relative situation of the parties in the different stages of the proceedings. The return of the sheriff on the attachment consists of two parts; first, that which relates to the goods attached and taken into possession, and secondly, that which relates to the monies, goods and chattels in the hands of the garnishee, and the money owing to the absent debtor by him. The return of the garnishee must also be considered with a view to its different parts. He acknowledges that he is indebted to the absent debtor two thousand six hundred dollars. He denies that he has any goods, monies, &c. of the garnishee in his hands; and says he has purchased all his stock in trade.—But whether the goods attached by the sheriff constituted a part of that stock, does not appear from the return. The creditors were at liberty to contest the truth of this return, or to acquiesce in it as they thought proper. This was an individual right which any or all of them might have exercised. It appears that they all acquiesced and went on to take their judgments against the absent debtor. The course of proceeding in this state of the cases would have been to have procured an order for the money due by the garnishee to be paid over in satisfaction of the attachments according to their priority, or to have entered up judgments against the garnishee for the amount; and to have obtained an order for the sale of the goods in the sheriff's hands, and that the proceeds should be paid over in the same manner. By their acquiescence, they admitted that the garnishee had nothing in his hands belonging to the absent debtor. The garnishee, however, not satisfied that they should thus proceed, interposes a claim on his part for the goods in the hands of the sheriff. His claim may be considered in the nature of a trespass for taking goods

belonging to him, or an assumpsit to pay him the proceeds of the sale. In either case he must be regarded as the plaintiff in the issue. The creditors throughout the proceedings have considered him as such, and have pleaded to his declaration. Now, viewing them in that light, it was not in their power to withdraw, or to have their names stricken out of the record. They had levied on specific property which he claimed. They held it subject to that lien, and he had a right to compel them to try the title.— And there was no way by which they could exonerate themselves but by discontinuing their attachment or entering satisfaction of the judgment. It is said, however, that this was an issue distinct from the attachment, and that each individual had a right to contest the question separately from the rest, and that none would be effected by the decision, except those who were parties to it. But I think that is a mistaken view of the subject. The question to be tried was, whether they were the goods of *Guerrièreau*, and subject to their attachments. They were all equally interested in the question; and the court had a right to make them all parties to the issue. And this issue constituted so necessary a link in the chain of proceedings, that it is as impossible to separate it from the original attachment as it would be to separate the judgment or the return of the garnishee. But let us suppose them not parties to the record in this issue, the result would be precisely the same. This was a feigned issue, and it was not material whether it was made up in the name of one or all the creditors, or even in the name of fictitious persons. As soon as it was decided unfavorably to the claim of *Forretier*, the proceeds would have been ordered to be paid over to the satisfaction of these attachments without distinction. So that whether they were parties or not to the issue, they had a direct and manifest interest in the result, because their testimony went to increase the fund, out of which the judgment which they had obtained was to be paid. If no specific property had been attached, and upon the return of the garnishee that he owed the absent

debtor nothing, nor had any of his effects in his hands, they had discontinued their attachment, they might have been witnesses for the creditors who thought proper to contest the return. But as long as their attachment was fastened upon these goods, whether they had been in the situation of the plaintiff or the defendants in the issue, or had not been a party to it at all, their interest was the same. It is however further contended, that having assigned their judgment to *Matheson*, and taken a release from him, their interest was removed. But they still remained parties to the record; and although they might not have an immediate interest in the event of the question then to be tried, yet these proceedings and the judgment to be entered upon them, would always remain as evidence for or against them in any other cause growing out of this transaction.— Suppose for instance *Forretier* had given *Brown & Moses* his bond to pay them the value of these goods whenever they should prove to the satisfaction of a jury that they belonged to *Guerrineau*, and they had brought an action upon it. Could they by assigning that bond to another person, pending the action, and taking a release from him, have made themselves witnesses in the cause? Most unquestionably not: and the two cases are precisely the same in principle. Suppose an action should be brought hereafter by *Matheson* against them, the judgment in this case would always be evidence for and against the parties to the proceedings. Suppose an action to be brought by *Forretier* against them for taking his goods, the attachment would be evidence against them of the fact of taking, while the order of the court directing the proceeds to be paid over to them, would be a perpetual bar to his action, even without a reference to the collateral issue. Or suppose an action to be brought on the judgment against *Guerrineau*, or by *Guerrineau* against them on a cross demand, all these proceedings must be resorted to for the purpose of adjusting the balance between them, the judgment would be evidence of so much due on one hand, while the order of the court directing the proceeds of the

goods to be paid over to them, would be evidence on the other, that such part of it had been discharged. On whatever side, therefore, we view the case, we see an interest coupled with it, from which they cannot be released as long as their names remain on the record, without releasing the debt itself. Indeed the true test of interest appears to be whether the judgment in the case in which the party is called to give evidence, can be given in evidence for or against him in any other case. The judgment in this issue must be, that the proceeds of the goods in the hands of the sheriff should be paid over to the satisfaction of these attachments according to priority, among which the attachment of *Brown & Moses* is one.

With regard to the second ground, I think that the wife of *Guerrineau* was properly rejected as a witness. The wife can never be a witness in any case where the interest of her husband is concerned: and the interest of *Guerrineau* is intimately connected with every stage of this proceeding.

It is unnecessary to give any opinion on the last ground.

I am therefore of opinion on the first ground that a new trial should be granted.

Justices *Johnson* and *Huger*, concurred.

Mr. Justice *Cantt*: I concur on the ground that the law itself creates a responsibility on the part of the attaching creditors which cannot be released.

Mr. Justice *Colcock* dissenting, gave the following opinion:

In order to determine the question under consideration, it is only necessary to have a correct statement of the facts, so that the relation of the parties in interest to each other may be clearly understood. *Joseph Guerrineau*, of this city, a shop-keeper, having suddenly absented himself, his creditors, about thirty in number, issued out attachments against him on the 31st December, 1816, and the two or three following days. Among the rest were *Brown*

§ *Moses*, whose attachment was issued on the 3d January, 1817. The sheriff, by virtue of some of the attachments, took possession of the goods on the 31st December, that is, soon after 12 o'clock, on the night of the 30th December, which was Sunday. The return of the sheriff was, that he had levied on the goods of *Joseph Guerrineau*, in the store in King-street, and also four negro slaves, and that he had served the present claimant with a copy of the writ agreeably to the act. On the 2d of January, 1817, the present claimant filed his return in the following words: "*Etienne Forretier* being duly sworn, maketh oath, that on or about the 28th day of December last, he did, for due and valuable consideration, become the purchaser of all the store and stock in trade, then belonging to *Joseph Guerrineau*, situate in King-street, (No. 42); that this deponent did pay unto the said *Joseph Guerrineau*, for the said goods, the sum of five thousand dollars in cash, and the sum of two thousand six hundred dollars and twenty cents by his bond, payable in one and two years by equal instalments. That the said *Joseph Guerrineau* did also sell and dispose of to this deponent, the following negro slaves named *John*, *Louis*, a female slave, and her female child named *Juliet*, for the sum of twelve hundred and fifty dollars: and the said *Joseph Guerrineau* did also, on or about the same period, sell, assign, and set over unto this deponent, the unexpired term of a lease of a lot of land, situate in King-street aforesaid: and this deponent doth, upon oath, deny that the house, the goods therein contained, or the negroes aforesaid, do belong to the said *Joseph Guerrineau*, who is said to be absent, and without the limits of the said state; and that he, this deponent, hath not in his possession any monies, goods, chattels, debts or books of accounts belonging to the said *Joseph Guerrineau*; by which it appeared that he claimed the goods and negroes attached by the sheriff. The attachment act authorizes the issuing a writ when the person shall abscond, to attach the monies, goods, &c. of the absent debtor, in the hands of any person or persons whatsoever,

and directs that the sheriff should summon such persons in whose hands any goods are found, by serving him with a copy of the writ, with a notice thereon indorsed, requiring him to appear before the justices to shew cause, if he can, why the goods should not be adjudged to belong to the absent debtor. "But if the person so summoned shall appear at the return of the said writ, and lay claim to the said monies, goods, &c. if the plaintiff rest satisfied therewith, then the attachment shall be discharged, but if not, then the claimant or person so summoned as aforesaid shall be put to plead the same, and the matter shall be tried by a jury forthwith, or at such other court and time as then shall be appointed by the justices, and the party that shall be cast in the same, shall pay to the prevailing party such reasonable costs and charges as shall be allowed and taxed by the chief justice aforesaid." Under this clause, an issue was made up to try the question, whether the goods were the property of the absent debtor or those of the claimant, and the form pursued was that of a feigned issue on a wager between the claimant and the creditors, he asserting that the goods were his, and they, that they were not. In this proceeding, which was adopted by the counsel for the claimants, he makes the claimant plaintiff, and all the attaching creditors, defendants. This matter had been depending from about May or June, 1817, until the last court in June, 1820, there having been one mistrial, when it came on before me for trial. And a motion was made to admit the defendants, (as they had been made) *Brown & Moses*, as witnesses. It appeared that they had failed in business since the issuing of the attachment, and that *Brown* had taken the benefit of the insolvent debtor's act. It also appeared that they had received full compensation from a Mr. *Matheson* for the debt due by *Guerrineau* to them, and that their interest in it had been transferred to him. A judgment had been obtained on the demand, and was standing apparently in their right, I therefore required that *Moses* should, on the back of his record, acknowledge a transfer of the judgment to *Mathe-*

son, (*Brown*, by his assignment, for the benefit of creditors, as well as by the alleged transfer to *Matheson*, had before divested himself of all interest in the judgment,) which was done. *Matheson* then gave a release to *Brown* & *Moses* from all future responsibilities, as to the assignment of said judgment, or the debts on which it was founded. A motion was then made to strike out the defendants and make them witnesses, which was done; and it is now objected that it was improperly done;

1st. Because they were defendants, and could not be stricken out without the plaintiff's leave; and

2dly. Because they are directly interested in the suit; and

3dly. Because, if not to be gainers by the immediate issue before the court, the verdict in this case might be given in evidence for them in future actions, and that this establishes a sufficiently direct interest to exclude them.

The first ground of objection must vanish the moment we advert to the nature of the proceedings. This was an interpleader to try the question immediately arising in the progress of a cause. The course of proceeding is left to the court, that is, the legislature has not directly or indirectly pointed out any: the words are, the claimant shall "be put to plead." I do not mean by any observations I shall make to object to the mode resorted to in this or any other case that might be adopted, except so far as to say, that neither party has a right to give it such a character as to prevent the object of justice. I therefore say that the claimant here had no right to make himself a plaintiff, and the creditors, defendants: for to my mind, it is clear, that after the return made by the claimant, the next step to be taken, where it is disputed, must be by the creditors, who, according to the forms I have seen observed, file a suggestion setting forth the objections to the return, and then the claimant is put to plead. They then are, as to the question or issue to be tried, (whether the goods are the property of the absent debtor or that of the claimant,) the actors. From this view, I first deduce that the strict rules

of law were wholly inapplicable to this interlocutory proceeding ; and secondly, that if they are to be applied, the creditors being the actors, according to any rule in such case, might withdraw. May not a creditor at one time believe that the return of a person in possession of goods was false, and afterwards be satisfied that it is correct ?— May not a creditor find that his attachment was too late to be beneficial to him even though all the goods be condemned as the property of the absent debtor ? And would it not in these and like cases be hard and unjust that a creditor who became a party to this interlocutory proceeding, merely from having been one of the attaching creditors, and by the act of the claimant should not be at liberty to withdraw upon the usual terms of a discontinuance which were observed in this case, viz : the payment of costs ? I think the answer is obvious. But suppose them really defendants ; may not a defendant disclaim when he is sued for the recovery of any property alleged to be in his hands or possession, or which is claimed by him ?

As to the second and third grounds of objection, I will consider them together, as they are in fact one and the same. The witnesses were not then interested in the immediate case ; they could neither gain nor lose by the verdict. It was said that their evidence would increase the fund out of which their judgment was to be paid. It was no longer their judgment ; their interest was gone, and they were released from all responsibilities ; it was therefore immaterial to them whether the judgment was ever paid or not. Now I will advert to the other criterion of interest on which it is said this point entirely rests. Could the verdict in the collateral issue be given in evidence, either for or against the witnesses, *Brown & Moses*, in any other suit to which they were liable, or which they might bring ? And here I would premise that we are not permitted to range in the field of fancy, and suppose possible actions : But the good sense of the rule is, that it must be clear to the court, that in some suit which could be maintained or was pending, such verdict might be given in evi-

dence for or against the person offered as a witness. The question of competency is one for the court, and they are not astute to exclude testimony, nor is it proper that they should be so. "It is certain that courts of justice now generally adopt the principle, that it is wiser to hear witnesses than at once to reject them unheard and untried; and they endeavor, as far as it is consistent with former decisions, to receive the testimony of witnesses, leaving the credibility to the jury." (*Phillips*, 35.) "The rule that a witness is not competent, if the verdict can be given in evidence, either for or against him in a future suit, is of all the rules the most comprehensive, and at the same time the most accurately defined. Lord *Kenyon* seems, (says the writer) to consider it as the only true test of competency. In the case of *Brent* and *Baker*, the true question is, Is the witness really interested in the cause? Sometimes he says counsel go further. But the general rule involves in it all others, and amounts to this, whether the record in the case will effect his interest? And again he says, I think the principle is this,—if the proceedings in the cause cannot be used for him, he is a competent witness, although he may have wishes on the subject. Mr. Justice *Buller* says, the true line I take to be this, is the witness to gain or lose by the event of the cause? And *Ch. B. Gilbert* lays down the rule thus: The law looks upon a witness as interested, when there is a certain benefit or disadvantage attending the consequence of the cause one way. And Mr. Justice *Buller* in another case says, I take the rule to be this: If the witness can derive no benefit from the cause before the court, (meaning a direct benefit) he is competent.

Having thus clearly ascertained the rule, I now proceed to apply it, and in order to do so correctly, we must look to the parties in interest before the court; for, as before observed, we are not to enter the field of conjecture. A great Judge, Lord *Hardwicke*, indeed has gone so far as to say, the suit in which the verdict may be given in evidence must be judicially known, that is, commenced:—

for says he, who knows that a man will commence every suit which he may commence. But I will take the rule in the utmost latitude in which it has been used. The parties in interest are the creditors of *Guerrineau*, among whom are the witnesses, *Brown & Moses*; *Guerrineau*, himself, the claimant *Etienne Forretier*, and *Matheson*, to whom the demand of *Brown & Moses* was transferred.— To begin with the last person, could *Matheson* sue *Brown & Moses* in the event of the judgment not being paid? He is precluded by his release from all responsibilities. Could *Guerrineau* commence any action? By the 11th section of the act, it is declared, that “in case any absent debtor against whom any attachment is issued by virtue of this act, shall appear within two years, and disprove the debt, duty or demand which shall have been recovered against him, he shall recover against the plaintiff in attachment, the full damages which he may have sustained for his unjust vexation, with treble costs of suit; provided, he gave notice in the Gazette that he is about to leave the state.” Now it did not appear that such notice had been given; but if it had been given, and the action would lie, it is only in case the debt is disproved; and in such case, the right to sue would not depend on this collateral issue, nor could it be effected by it, consequently the verdict could not be given in evidence. The abstract question in such action would be, was the debt unjust? But if the goods were *Forretier's*, no damage could result against *Guerrineau* by attaching them, and the evidence of *Brown & Moses*, when it went to shew the goods in *Guerrineau*, would have had the effect of giving him the action rather than taking it away; consequently would have been against their interest. But it is said, and with confidence, that if the goods were *Forretier's* he might sue *Brown & Moses* for a trespass in taking them, and the verdict in the collateral issue might have been given in evidence. But I lay it down, without the shadow of a doubt, that no such action could have been maintained against them. No action can be maintained against a man who uses the process

of law in a legal manner. If a doubt could exist upon this point, the facts of the case shew at all events that no suit could be maintained against *Brown & Moses* by *Guerri-neau*, for a trespass ; for by adverting to the lodgment of their attachment, it will be found that it was one or two days after the return of *Forretier*. It is then clear that if a trespass had been committed in taking the goods, *Brown & Moses* could not be accountable ; for the goods were in the custody of the law and the officer, before the attachment of *Brown & Moses* was lodged.

JOHN F. BURQUIN & Co. vs. JAMES FLINN.

Where the plaintiffs, consignees at Wilmington, wrote to the defendant, owner at Charleston, that his ship would need some repairs, but did not know the amount, but perhaps 6 or \$700, and that the captain would write the particulars ; and also said that the captain would want funds to have the same done, and requested to know if they, the plaintiffs, should draw for the disbursements ; and in answer, the defendant directed that the *Captain* should draw in favor of the plaintiffs for the disbursements ; and the disbursements afterwards turned out to be \$2,195 85 ; the court *Held*, that the *captain* was the legally constituted special agent of the defendant ; and that the defendant was bound to pay a draft he drew in favor of the plaintiffs for the full amount of the disbursements.

An owner is generally only responsible for necessaries to his ship ; but the jury only can decide what are necessaries.

THIS was an action to recover the amount of the disbursements of the British brig *Mary*, *Robert Bibby*, master, owned by the defendant. On the 17th May, 1817, the *Mary* arrived at Wilmington, North-Carolina, from Kingston, with a cargo of rum, sugar and coffee, on account of *Palmer*. She was to return with a cargo of lumber. The plaintiffs were consignees. They sold the rum, sugar and coffee, and purchased and shipped a cargo of lumber.

On the 7th June, the plaintiffs wrote to the defendant in Charleston that the brig had arrived ; that she was hove down and required some repairs : the amount of disburse-

ments had not yet been ascertained; that captain *Bibly* appeared attentive and economical, and would write, they presumed, by the same mail, to the defendant. The plaintiffs further stated, that they were unacquainted with the particulars of the charter party.

On the 9th they wrote to the defendant, that by the same mail, captain *Bibly* would advise him of particulars relative to the brig; and, "as it is possible he may require some funds for his disbursements, and is disappointed in receiving facilities from Messrs. *L.* and *M.* he wishes us to point out a mode to you to remit here. This can be done readily by your friend in Charleston, authorizing our draft on him at 60 days. We do not yet know the amount of the disbursements, perhaps 6 or 700 dollars. Captain *Bibly* has attended closely to her repairs. Every economy, we presume, will be practised."

On the 17th, the defendant wrote to the plaintiffs, acknowledging the receipt of their letter of the 9th, and directed them to take captain *Bibly's* draft in their favor, on *Charles Edmonston* of this city, for the disbursements of the *Mary*, and then states that he was about to leave Charleston for Liverpool, and begged that he may there hear from them.

It appeared from the account filed, that the disbursements amounted to \$2,195 85, leaving a balance of \$1,790 48-100 against the brig; for which balance, a bill was drawn by *Bibly* in favor of the plaintiffs, on *Charles Edmonston*, who refused to accept it, as only 700 dollars had been left in his hands for that purpose by the defendant.

The plaintiffs then produced a witness, who, on examination of the account, declared it to be reasonable. That it was very common for the disbursements of vessels to overrun the estimates. That the plaintiffs were a very reputable house in Wilmington. The witness further stated that he knew *Roach*, who was the confidential clerk of the plaintiff's in 1817; he left the city of Charleston in 1818, and was reputed dead.

Another witness, who was the under clerk of the plaintiffs in 1817, proved that the account filed was a correct copy from the books of the plaintiffs, that the entries were in the hand-writing of *Roach*. He further stated, that large sums were paid by the captain for seamen's wages ; that on the arrival of the *Mary*, her crew were paid off, and advances made to such as re-shipped.

In conformity with the charge of the court, the jury found a verdict for the plaintiffs to the full amount of the bill, with interest.

A motion was now submitted for a new trial on several grounds, all of which are embraced under the three following :

1st. That the defendant's letter of the 17th of June, cannot be considered as an agreement to accept a bill for more than \$ 700.

2ndly. That the defendant is only responsible for necessities furnished.

3dly. That the account of the articles furnished is not sufficiently proved.

Mr. Justice *Huger* delivered the opinion of the court.

The plaintiffs, in their letter of the 9th, only suggested that the disbursements of the *Mary* would, perhaps, amount to \$ 700. They were not known, and could not indeed have been ascertained at the time ; for they were not complete. The defendant, in his letter of the 17th, refers to no particular sum, but merely directs that a draft of the captain should be accepted for the disbursements. The plaintiffs state that the captain will want money for the disbursements, and propose that they should be permitted to draw on some friend in Charleston for the advances to the captain for disbursements. The defendant replies that the captain himself must draw, not the plaintiffs, thereby constituting the captain his special agent for the purpose. This shews that the owner reposed confidence in the captain, and trusted to him, not to the plaintiffs for the propriety of the disbursements ; and this is in

answer to a letter, in which the plaintiffs write, that they presume the captain will practise economy; shewing that they regarded him responsible for the economy used. It is not pretended that the plaintiffs acted fraudulently; but it is contended that they are responsible for the supposed imprudencies of the captain. The jury thought the trust had been reposed by the defendant, not the plaintiffs, and therefore gave them a verdict. I entertained the same opinion at the trial, and now see no reason for changing it. On the first ground, therefore, the motion must fail.

That an owner is generally only responsible for necessities, is not denied. In the case of *Carey vs. White*, (1 Bro. Par. Cases 284,) this doctrine was fully considered and firmly established. It has not, I believe, been seriously questioned since. But what are necessities, the jury only can decide, as was ruled in the case just cited.— But it is contended the jury had not sufficient evidence before them to authorize the conclusion that the articles furnished in this case were necessary. One witness declared that the articles furnished were generally necessary to vessels similarly situated. The captain who was the confidential servant of the owner, and the best judge of what was necessary, certifies, under his hand, this account.— Another witness proves that large sums were paid and advanced to the seamen. A large item in the account is for the duty; another is the carpenter's bill, &c. &c. This was evidence enough to go to the jury; and I have seldom seen a jury better qualified to decide such a question, than the one to which it was submitted. They were generally merchants.

But it is contended that it was not only incumbent on the plaintiffs to shew the necessity to borrow the money, but to prove the actual application of it. The account states the particular disbursements with the exception of about \$ 600, advanced to the captain at different times.— Out of this sum he must have paid the crew discharged as well as the advances to the crew shipped; and there are several articles essential to the voyage not specifically

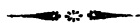
charged, and which must have been paid out of the money advanced to the captain. This was enough to authorize the jury to find as they did, independent of the special authority given in the defendant's letter of the 19th June.—

In the case of *Palmer vs. Gosch*, —————

relied upon by the appellant, the captain had been engaged in some speculation on his own account; for which advances were made by *Palmer* to more than £ 20,000.—£ 1,700 were charged to the ship; but it appeared that the disbursements of the ship amounted to but £ 2,894, and the captain had funds belonging to the owner to about £ 2559 7s. and 3d. And it was not even contended that more than £ 953 8s. of the £ 1,700, had been applied to the disbursements of the ship. And of this there was no other evidence than that of the purser, who merely stated that so much had been expended on the ship. This was no advance on account of the owner, nor was the bare declaration of the purser without an account stated, or a particular charge mentioned, sufficient evidence of the appropriation. The words of lord *C. J. Abbott*, are explained by the case he decided, and when thus explained. afford no ground for this motion.

On all the grounds, the appellant must fail.

Justices *Colecock*, *Gantt*, and *Johnson*, concurred.



N. DAVIS vs. JOHN M. VERDIER.

Where the agent of the plaintiff called on the defendant for payment of an account, within the four years, who admitted that he had bought the goods charged, but stated at the same time that he had paid for them by an order on a third person, and said that he would produce the receipt; and the impression on the mind of the witness was, that the defendant intended to pay the amount if he could not produce the receipt, which he never did; the Constitutional court refused to set aside a decree of the Circuit court in favor of the plaintiff, as the acknowledgment was sufficient to prevent the effects of the statute (a.)

SUMMARY Process on open account for a set of harness sold in 1815; price \$60, to which the statute of limitations was pleaded.

Gresham Smyth testified that the defendant admitted that he had bought a set of harness from the plaintiff, but stated at the same time that he had paid for it by an order drawn on the house of *Graves & Son*, in Charleston, and the defendant said he would produce to *Smyth* the receipt. The application by *Smyth*, as the agent of the plaintiff to the defendant, was made previous to the expiration of four years from the credit given; and *the impression left on the mind of Smyth* was, that the defendant intended to pay the bill, *if he did not produce the receipt, though no expression of that kind was made.* *Smyth* also proved that had not the defendant stated that he had paid the order, and would produce the receipt, he, *Smyth*, would have put the account in suit previously to the expiration of four years.

Upon this evidence, Mr. Justice *Gantt*, who presided, gave a decree for the plaintiff.

The present motion was to reverse that decree on the ground, that the presiding Judge mistook the law in deciding that the acknowledgment of the defendant was sufficient to take the case out of the statute of limitations.

Mr. Justice *Gantt* delivered the opinion of the court.

It appears from the evidence, that when *Smyth*, the agent of *Davis*, the plaintiff, demanded payment of the account from the defendant, the four years had not expired, and that the present action was instituted within four years from that time. The defendant said he had paid the account, and would produce the evidence of the fact to the agent. Had the case been barred before by the lapse of time, this acknowledgment would have been sufficient to take the case out of the statute relied on. But here the statute does not apply; the case never was barred. The defendant omitted to produce the evidence of payment at any time, either before or at the trial. The court are of

opinion that the statute of limitations cannot avail the defendant, and that the decree was justified by the evidence which the trial furnished, and the law arising thereon.

Justices *Bay, Nott, Colcock, Johnson* and *Richardson*, concurred.

(a.) See *Burden vs. McElhenny*, (2 *Nott & McCord*, 60.)—*Ex'ors. of Boyd vs. Ex'ors. of Carmichael*, (*Do.* 62;) and authorities there referred to.—R.

MANUEL A. FERNANDEZ vs. JOHN LEWIS.

Where the defendant drew a bill, the 11th of June, on A. in N. York, in favor of the plaintiff, payable *three days after sight*, and some time during June, the plaintiff went to New-York, and resided in the house of A. until the 24th of August, when the note was protested, and notice of non-payment and failure of A. was sent to the defendant, The court *Held*, that the plaintiff, by his laches lost all claim upon the defendant, the drawer, and of course could recover nothing.

Case on Bill of Exchange.

THE defendant in Charlestown, on the 11th of June, 1816, drew a bill of exchange on *Anthony Belany*, of New-York, payable three days after sight, in favor of the plaintiff. It does not exactly appear when the plaintiff sailed for New-York, but it is certain he did so some time in the month of June. On his arrival in New-York, he resided with *Belany*, and it was not until the 24th of August following that the bill was protested for non-payment; at which time, notice was transmitted to the defendant; *Belany* having on that day failed.

The jury found a verdict for the defendant, under the charge of the court, that due diligence had not been exercised by the plaintiff, from which the plaintiff appealed.

The case was tried before Mr. Justice *Huger*, at May Term, 1820, for Charleston district.

Mr. Justice *Gantt* delivered the opinion of the court.

It is a singular circumstance that during all the month of July, and until the 24th of August, when the failure of *Belany* took place, there is no evidence of any application being made to the drawer by the holder of this bill. When a bill is drawn, payable within a specified time after sight, it is necessary, in order to fix the period when the bill is to be paid, to present it to the drawee for acceptance. In other cases, it is not incumbent on the holder to present it before it is due. (*Chitty on Bills*, 67.)

The rule in relation to bills, whether payable at sight or so many days after sight, or in any other manner, is, that due diligence must be used. The holder has no privilege to retain the bill in his possession for such a length of time as may occasion a loss to the drawer, but ought to present the bill as soon as possible, and it must be done within a reasonable time. What is reasonable time, depends upon the particular circumstances of the case : and it is for the jury to determine whether any laches is imputable to the holder. As it was incumbent upon the holder of this bill to have presented it for acceptance within a reasonable time ; so on refusal to accept, notice must be given as soon as possible to the persons on whom the holder means to resort for payment, or they will, in general, be totally discharged from responsibility. The case of the plaintiff does not fall within any of the exceptions to this rule. He did not prove on the trial of this case that the defendant, who insists on the want of notice, did not sustain damage by his neglect ; for the law always presumes that the maker of a bill has effects in the drawee's hands, and that the chance of obtaining satisfaction from the drawee is by the holder's neglect to give notice rendered more precarious. In this case, the plaintiff has no possible excuse for the gross neglect which his conduct evinced. On his arrival in New-York, the drawee was in credit ; the plaintiff resided with him, and was privy to his declining circumstances, and yet made no attempt to secure the payment of the bill. On the failure of the drawee, and not before, the

bill is protested for non-payment, and notice given to the drawer; seventy-four days having elapsed between the date of the bill, and the notice of its non-payment. A great part of which time the holder was in the habit of daily intercourse with the drawee, and on a footing of intimacy and friendship. Had the bill been duly presented for acceptance, as it ought to have been, and not paid at the time it became due, the protest for non-payment should have been made on the day of refusal, and notice of the dishonor sent by the earliest ordinary conveyance. All that was incumbent on the plaintiff to perform, might and ought to have been done, at farthest, before the middle of July; and yet he took no one step to obtain payment, as appears from the report of the evidence before the 24th of August. After a neglect so palpable and gross, he has justly saddled himself with the loss. The verdict of the jury was legally correct, and cannot now be disturbed: and this is the unanimous opinion of the court.

Justices *Colcock, Nott, Johnson* and *Huger*, concurred.

THOMAS GREEN vs. ELIZA SMITH.

A citizen and resident of Rhode-Island may sue a citizen of South-Carolina, resident of Charleston, in the city court of Charleston.

Indeed it seems that *any* person competent to sue, may institute an action in the city court against *any* inhabitant who resides within the city, to the extent of (\$ 500) the jurisdiction conferred.

It seems also that where the defendant resided in Charleston, and ordered goods to be sent to her, that the contract will be considered as arising in Charleston.

In the City Court of Charleston, July Term, 1820. Assumpsit for goods sold and delivered.

THE report of the Recorder is as follows: "That the plaintiff was a citizen of, and a resident in the state of Rhode-Island; the defendant, a citizen of South-Carolina, and a resident of the city of Charleston. The defendant ordered certain goods to be shipped to her in Charles-

ton. They were accordingly shipped to her, and arrived safe; but in consequence of a man of the name of *Uniacke* obtaining fraudulent possession of one of the bills of lading the goods were taken out of the vessel by him, and the defendant never got them. The defendant upon the back of one of the bills of lading acknowledged the receipt of the goods and their freight, though she never received them.

"After this testimony had been offered, the defendant's counsel moved for a non-suit, upon the ground that the case was not within the jurisdiction of the court, as the plaintiff was not a resident of the city, and the contract did not arise within its limits. The non-suit was refused. Under the general words of the acts of the legislature of 1801 and 1818, the plaintiff, wherever he resided, might bring a suit in this court, and there existed no exception which would exclude him from that right. (See the 2d clause of the act of 1801, and the 4th clause of the act of 1818.)—The words made use of in the act of 1818, are, that this court shall have jurisdiction in all cases of trover, &c. &c. "arising within the said city." The words of the act of 1801, in its fourth clause are, "that no suit or action shall be brought in the said court, unless the contract or cause of action hath been made, or *arose* within the limits of the said city of Charleston." This clause in the act of 1801, not being repealed by the act of 1818, and being in *pari materia*, illustrates the meaning of the legislature, and shews it to have been, that a suit may be commenced in this court when a contract originates here, or where a party who is suable, is resident here. And the latter part of the clause last referred to, necessarily implies, if it does not express, that if an action can be sustained against an individual resident in the city, that it may be sustained against him, although the contract might have been completed in another place. Immediately after requiring that the contract or cause of action must arise or be made in the city, the act says, "but nothing herein contained shall be construed to bar *any* person from suing *any* person resident in the said city, in the said court, for any sum not

exceeding '\$100," (by act of 1818, extended to \$500,) "exclusive of costs."

"It appeared to me, in this case, that the contract ought to be regarded as substantially arising in the city. The order was to be executed by sending goods to Charleston to a person resident in Charleston. "A contract made in a foreign country, but to be performed here, and invalid in the place of the contract, by reason of some formal defect, is not for that cause, to be deemed invalid here." (*Ludlow vs. Van Rensselaer*, 1 *Johns. Rep.* 94.) "A contract made in a foreign country, but to be executed here, is to be governed by the laws of this state, so that the defendant may avail himself of a defence permitted by our law, but which he would not be allowed to use in the place where the "agreement was entered into." (*Thompson vs. Ketcham*, 4 *Johns. Rep.* 285.) As the goods were to be delivered here, and as they were delivered here, upon their delivery, it necessarily resulted that payment for them might be instantly demanded, unless some other special agreement had been shewn; and upon failure to pay, a cause of action immediately arose. For these reasons, the motion for a non-suit was overruled. The case then went to the jury, who found a verdict for the plaintiff."

Mr. Justice *Gantt* delivered the opinion of the court.

The defendant has appealed in this case, on the ground that a non-suit ought to have been granted for defect of jurisdiction in the city court. But the reasoning of the Recorder, in relation to the acts of assembly of 1801 and 1818, giving jurisdiction to the city court, is conclusive to shew that there was no usurpation of jurisdiction. These acts are to be construed *in pari materia*. The act of 1818, extended the jurisdiction to cases not before cognizable in the city court, but was not designed to impair, in any manner, the extent of jurisdiction given by the act of 1801.—*Any* person may institute an action against *any* inhabitant who resides within the city to the extent of the jurisdiction conferred; the right of the Recorder to sustain jurisdic-

tion of this case, follows of course. For myself, I perfectly coincide too in the opinion expressed by the Recorder, that the cause of action in the case appealed from, did substantially, and I will add actually, arise within the limits of the city of Charleston. The order for the goods was drawn in Charleston; it is this order which creates the responsibility, and gives the right of action against the defendant. The delivery of the articles under the order to the agent of the defendant is, in law, the delivery of the articles under the order to the defendant himself. A bare delivery, without an authority to deliver, would create no cause of action. Had a bond been executed by the defendant, after receiving the goods in Charleston, and forwarded to the plaintiff, the bond would have become the cause of action, and having been executed in Charleston, would have been made there pursuant to the words of the act of 1801; and for such cause of action, could there be a doubt but that the plaintiff might have instituted an action in the city court? In either case the delivery of the goods completes the contract, and the place from whence the overture is made, may be regarded as the place of contract; for all which is subsequently done by virtue thereof, rest upon it as a foundation. The overture here was made in Charleston, acquiesced in by the plaintiff, and the goods delivered to the person making it in Charleston. The cause of action of course arose in that place, and not elsewhere; but whether I am correct herein or not, the act of 1801 confers upon the plaintiff the right of suing the defendant in the city court. The very able opinion of the Recorder, detailed in his report, would have saved me the necessity of doing more than declaring, as I now do, my concurrence in the opinion which he has expressed.

The motion for a non-suit is refused.

Justices *Nott*, *Fohnson* and *Colcock*, concurred.

Mr. Justice *Richardson*, dissented.

The Adm'rs. of GEORGE SMITH, deceased, vs. RICHARD W. VANDERHORST and Wife, Executrix of R. SHAKLEFORD.

Judgments by default are interlocutory or final; and although in actions of debt, the judgment by default is commonly said to be final, still where the action is brought on a judgment, the plaintiff is entitled to a writ of enquiry, after a judgment by default, to recover interest by way of damages for the detention of the debt.

In an action of debt upon a judgment, which judgment had been for damages to the amount of the penalty of the bond upon which the action had been brought, the court *Held*, that the plaintiff in his action upon the judgment could recover interest by way of damages beyond the penalty of the bond, upon which the judgment was founded.

THIS was an action of debt brought on a judgment obtained by the plaintiff's intestate on the 12th day of June, 1813. The case was ordered for judgment against the defendants, and was placed on the writ of enquiry docket for the purpose of recovering the damages occasioned by the detention of the debt. The original judgment was founded on a bond of *Richard Shackleford*, in the penalty of £ 595 1s. and 6d. equal to \$2,550 32-100, conditioned for the payment of £ 297 10s. and 9d. or \$1,275 16-100, with interest thereon from the 26th April, 1802. No payments had been made thereon, and on the 11th of August, 1816, the principal and interest due thereon amounted to a sum which equalled the penalty. It was contended on the part of the plaintiffs that they were entitled to recover not only the amount of the penalty with the costs of the former suit, and for which the original judgment had been rendered, but also interest thereon by way of damages for the interest which had accumulated beyond the amount of the penalty, from the 11th of August, 1816, to the time of the verdict to be had in this action.

The case was tried before Mr. Justice *Richardson*, at the October Term, 1820, for Charleston district, who decided that the plaintiffs were not entitled to recover beyond the penalty of the original cause of action, and that this be-

ing an action of debt, the order for judgment was final, and rendered a writ of enquiry unnecessary.

The grounds taken for a new trial may be comprised in the two following :

1st. That the plaintiffs were entitled to a writ of enquiry to ascertain the damages which they had sustained by reason of the detention of the debt ; and,

2d. That they were entitled to recover interest by way of damages beyond the amount for which the original judgment had been rendered, to-wit, the penalty of the bond:

Mr. Justice *Gantt* delivered the opinion of the court.

Judgments by default are interlocutory or final, and although in actions of debt, the judgment by default is commonly said to be final, still where the action is brought on a judgment, the plaintiff is entitled to a writ of enquiry, after a judgment by default, to recover interest by way of damages for the detention of the debt. In accordance with this position is the case of *Blackmore vs. Flemyng*, (7 Term Rep. 446,) where, after judgment by default, in an action of debt on a judgment, the plaintiff sued out a writ of enquiry, and the court thought that there was neither irregularity nor oppression in the proceeding, saying, that the plaintiff was damnified by reason of the debt having been withheld from him, and that he had a right to the damages for that detention. Indeed the constant practice in England, both in the court of King's Bench and Common Pleas, since the case of *Holdipp*, the executor of *Dowse vs. Otway*, (reported in 2 *Saunders*, 106-7,) upon an interlocutory judgment, is, for the court without any writ of enquiry, to refer it to the Prothonotary to ascertain the damages and costs ; provided the plaintiff does not choose to have a writ of enquiry of damages ; the option being with him, either to refer it, or have a writ of enquiry.

Where an inquisition is taken, it is to inform the con-

science of the court merely in cases of interlocutory judgments ; where, from the particular circumstances of the case, it is doubtful whether any, and if any, what damages should be given. In cases of this description, it should be left to a jury to consider of the damages. The case of *Nelson vs. Sheridan*, (8 Term Rep. 395,) is quoted as an example where the court refused to grant the rule on an interlocutory judgment in debt, on a judgment in an action brought on a bill of exchange, *Lord Kenyon*, chief justice, saying, it should be left to a jury to consider whether any, and what damages should be given. I think, therefore, there is no doubt but what the plaintiffs in this action were entitled to a writ of enquiry.

I think too that the plaintiffs were entitled to recover interest by way of damages, beyond the amount for which the original judgment had been rendered. If damages are allowed on the ground that the debt has been detained, then, in reason, there can be no distinction between cases where those damages exceed, and where they do not exceed, the penalty ; it appears as forcible in the one case as in the other. It may be presumed that an obligee would rarely suffer a bond to remain unpaid so long as that the interest would exceed the penalty. The judgment in an action of debt on bond, is to be rendered for the penalty. It is the stipulated forfeiture for the non-performance of the condition, and the obligee being a party to the contract, has no reason to complain, if by his neglect to enforce payment, the interest should exceed the penalty.— But when a judgment has been recovered in an action on the bond, the nature of the demand is altered, the judgment is rendered for a fixed sum ; to-wit, the penalty ; the obligor has it in his power, at all times, to discharge the debt before it reaches the amount of the penal sum ; but if he fails to do so till the interest amounts thereto, the sum for which the judgment was rendered, becomes the actual debt due, and if payment is longer delayed to the injury of the plaintiff, he is entitled to interest by way of damages for the detention. The judgment rendered fixes

the amount of debt due. There is no longer any penalty. The bond debt has become merged in another and higher security, and constitutes a new debt; and such is the opinion expressed by *Lord Kenyon*, in the case of *McChure vs. Dunkin*, (1 *East. Rep.* 436,) who said, "if this had been an action on the bond, the objection would have holden good; but after the judgment recorded, *transit in rem judicatam*, the nature of the demand is altered: and this being an action on the judgment, it was competent to the jury to allow interest to the amount of what was due."— (See also *Buller*, 174.)

I think both grounds have been ably and fully supported by the counsel for the plaintiffs, and that a new trial should be granted.

Justices *Nott*, *Johnson*, *Huger*, and *Colcock*, concurred.



EDWARD SHREWSBURY vs. BENJAMIN PEARSON.

The court in a doubtful case, will not, on motion, set aside a foreign attachment, on affidavit that the debtor was in the state at the time of issuing the attachment; nor upon affidavit that the debtor within a year and a day had taken the benefit of the insolvent debtor's act, which act prohibits any suit from being brought against such debtor for a year and day, and which year and day had not expired before the suing out of this attachment.—(a.)

MOTION to set aside a foreign attachment at October Term, 1820, for Charleston district, before Mr. Justice *Bay*, who refused the motion. This was therefore an application to reverse that decision.

The grounds taken below were:

1st. That the defendant was within the state when the attachment issued; and,

2d. That no suit could be commenced against the defendant for a year and a day, after having taken the benefit of the insolvent debtor's act, which time had not elapsed before the suing out the attachment in this case.

To support the first ground, certain affidavits were produced, tending to prove that the defendant arrived in

Charleston on the morning of the day, and before the attachment issued.

On the part of the plaintiff, it was contended that the fact of the defendant being in the state or not, when the attachment issued, should be left to the jury to determine, and time was required to shew that the defendant was not within the limits of the state at that time.

On the second ground, it was said in behalf of the plaintiff, that the defendant had been guilty of fraud in concealing property which ought to have been given up.

Mr. Justice *Gantt* delivered the opinion of the court.

Whatever the practice may have been in relation to motions of this kind, it cannot be denied but that a judge, in a doubtful case, may and ought to refuse a motion to quash an attachment by affidavit before him. Whether the defendant was in the state at the time the attachment issued, constituted a fact which might have been pleaded in abatement; it was certainly competent in the plaintiff to deny the existence of such fact, and if the court found that the question was one of doubt, it would have been a departure from duty to have decided it without the intervention of a jury. On this ground I think the discretion exercised by the Judge below was correct and proper.

The same may be said in relation to the second ground; questions of doubt and difficulty are not to be decided hastily upon motion. Here it was alleged that the defendant had been guilty of a fraudulent concealment of his property; if such was the fact, he was not entitled to the benefit of the act, and this constituted a fact which the court ought not to have decided.

The motion is refused.

Justices *Johnson*, *Huger*, *Colcock* and *Richardson*, concurred.

(*n.*) See *Harris vs. Trapp*, and *Grisham vs. Deale*, (2 *Nott & McCord*, 130,) and *Degnan vs. Wheeler & Co.* (*Do.* 323.) Our court seems to have made a difference between *domestic* and *foreign* attachments; in the *former* holding that the attachment cannot be set aside

by *motion*, and in the *latter*, in the last mentioned case, they were equally divided, whether on *motion* a *foreign* attachment could be quashed. In the case just reported, the last question seems not to be decided. It seems to be the decision of a particular case, under its own circumstances; but it was thought best to publish it.—R.



THE CITY COUNCIL vs. JOHN DUNN.

A person cannot, by his own oath, exculpate himself from the penalty, under the city ordinance of Charleston, against riding or driving faster than a walk in turning the corner of a street.

THIS was an action in the City Court to recover a penalty imposed by a city ordinance, on persons riding or driving faster than a walk in turning the corner of a street. The same ordinance provides that if the party offending shall prove to the satisfaction of any one of the city wardens, that he was compelled to ride or drive by urgent causes, he should be exempted from a prosecution for that offence.

The offence was clearly proved, and Judge *Holmes*, the Recorder, overruled an objection made to the competency of the defendant to exculpate himself on oath; and he was sworn, and the jury found for the defendant.

A motion was made for a new trial, on the ground that the defendant was not an admissible witness.

Mr. Justice *Johnson* delivered the opinion of the court.

I am not aware that there is any exception to the rule, that a party shall not be a witness in his own cause, but in cases where there exists a statutory provision expressly authorizing it, and in the cases of merchants, shop-keepers, &c. The ordinance on which this prosecution is founded requires that the party shall prove to the satisfaction of one of the city wardens that urgent causes compelled him so to ride, &c. But the mode of proof is not pointed out, and it follows that the common law mode

must be adopted, which excludes the party himself from being a witness.

The motion is therefore granted.

Justices *Buy*, *Colcock*, *Richardson*, *Huger* and *Nott*, concurred.

Toomer, for the motion.

Crafts and *Eckhard*, contra.

JOHN L. PEZANT vs. JOHN CRAWFORD.

A wharfinger, who has not been directed to store, is not liable for the loss of rice upon his wharf, after it has been weighed; for the wharfage paid is not a consideration for the safe keeping of the rice.

THIS was a special action on the case against the defendant as a wharfinger, for the price of two barrels of rice, alleged to have been lost whilst in his custody, and tried before the Recorder of the city of Charleston.

A witness, called by the plaintiff, deposed that he saw a quantity of rice upon the defendant's wharf, belonging to Mr. *B. Huger*; the number of barrels he could not recollect; that he saw sixty barrels weighed, which was represented to him to belong to Mr. *B. Huger*; that he sold this rice as amounting to that quantity to Mr. *Stoney*, for the plaintiff; that he informed the weigher, the clerk of the defendant, that the rice was sold, but he gave no order respecting it; that he heard a conversation between the plaintiff and the defendant, from which he collected that the wharfage for the rice had been paid; that the defendant had not been directed to store it; and after weighing it, the defendant declared he did not consider himself responsible for any of the rice which might thereafter be missing. The rice, the witness stated, had been sold for \$5 75 per the hundred.

Another witness, called by the plaintiff said, that he as the plaintiff's agent received, at *Mey's* wharf, all the rice

bought from Mr. *Simons* by the plaintiff. That the first parcel of it arrived a little before he went to dinner, which was about half past one, and that between four and five o'clock, it was discovered that two of the barrels were missing.

A witness produced on the part of the defendant said, he was the defendant's clerk ; that he delivered the sixty barrels of rice above alluded to, to a man of the name of *Butler*, who asked for it in the plaintiff's name, and who the plaintiffs told the witness had been sent by him for the purpose of receiving it. Upon being cross-examined, the witness said, when he delivered the rice to *Butler*, he did not count it ; that he saw the drayman take some of the rice, for which he brought a number of drays, and sent two barrels on each dray ; that the rice had been weighed about ten minutes before its delivery ; during which period none of the barrels were missing. He says none of the barrels were missing, because, between the time of the weighing and of the delivery, the rice was near to him and under his eye. That to the best of his recollection, it was delivered before his hour of dining, which was about 2 o'clock, when he left the wharf ; that he did not see the drayman carry away all the barrels, only some of them, how many he could not remember. The witness further said that after rice is weighed and no directions given to store, the wharfinger receives no further compensation.

The plaintiff's counsel contended, that as the defendant had received a compensation for the wharfage of the rice, he was liable for the price of the two barrels which were missing, and that no delivery to the plaintiff had been proved.

The defendant's counsel insisted that after the weighing of the rice, the wharfinger was no longer liable, as he had not been directed to store ; and that at all events, he was not responsible in this case, as there had been no delivery to the plaintiff's agent.

Under the directions of the Recorder, the jury found

a verdict for the defendant ; and now a motion was made for a new trial on the following grounds, viz.

1st. That the Recorder misdirected the jury in charging that in law the defendant was not liable, as the wharfage paid was not a consideration for the custody of the rice.

2d. That the verdict was contrary to evidence, as no delivery was proved.

Mr. Justice *Huger* delivered the opinion of the court.

I cannot express my opinion more clearly than in the words of the Recorder. " It does not appear to me that the wharfage which was paid for the rice, was a compensation for its safe keeping. The legislature has allowed certain rates for the wharfage or landing of rice, and certain other rates for storing it, implying that they were different things. No other compensation then for wharfage has been paid in this instance, and if the law were otherwise, as the defendant has proved a delivery, since when it is to be presumed that the loss must have occurred, I do not think the plaintiff can legally sustain his action."

I am therefore of opinion that a new trial ought not to be granted.

Justices *Bay, Colcock, Richardson, Nott and Johnson*, concurred.



JOHN H. SARGEANT *vs.* HON. WM. JOHNSON, SOLOMON MOSES, and J. S. COGDELL.

To an action for false imprisonment, the defendants pleaded "not guilty within *four* years," (whereas the act requires but *one* to bar the action) "next before the suing out of the original writ." The plaintiff replied that he had sued out the writ within the time required by the law. To this replication, the defendants demurred, and assigned for cause, that the replication was vague and uncertain, in not denying the defendant's plea, nor in specifying the time within which the writ was issued ; the court *Held*, that if the plea was defective, (which it did not seem to think,) it could only be taken advantage of by a special and not a general demurrer ; which advantage was writ

ed by the plaintiff's replication: and that the replication was also defective, inasmuch as it did not deny the allegation in the defendant's plea, nor specify the time within which the action was commenced. The rule that the court will look back through all the proceedings, and give judgment against the party who has been guilty of the first fault in pleading, applies only where the preceding pleadings were defective in substance and not merely in form, and such as would be aided on a general demurrer.

THIS was an action of false imprisonment, tried before Mr. Justice Bay, Fall Term, 1819. The defendants pleaded not guilty within four years next before the suing out of the original writ. The plaintiff replied that he had sued out the writ within the time required by the law. To this replication, the defendants demurred, and assigned for causes of demurrer, that the replication was vague and uncertain in not denying the defendant's plea, nor in specifying the time within which the writ was issued.

The presiding Judge maintained the demurrer, and gave judgment for the defendants in the action.

This was a motion to reverse that decision.

Mr. Justice Nott delivered the opinion of the court.

The defendants in this case appear to have been under an impression that the act of limitation allows a plaintiff in an action of false imprisonment four years to commence his suit, whereas it allows but one. And it appears by some authorities that a special demurrer to such a plea ought to be supported. (1 *Espinasse N. P. pt. 2*, 181.—*Salk*, 442.) But it is difficult, perhaps, to give a good reason for that rule. The general rule of law is, "*omne majus continet in se minus*." If the defendants had not been guilty within four years, *a fortiori*, they could not have been guilty within one. But admitting the plea to be bad, it could only be taken advantage of by a special and not by a general demurrer, (6 *East*, 387, *Macfaden vs. Olivant*;) and this advantage the plaintiff waived by his replication. The replication also is defective, inasmuch as it does not deny the allegation in the defendant's plea, nor specify the time within which the action was commen-

ced. It is now contended that as the defendants have demurred to the plaintiffs replication, the court will look back through all the proceedings, and give judgment against the party who has been guilty of the first fault in pleading. But that rule applies only where the preceding pleadings are defective in substance and not merely in form, and such as would be aided on a general demurrer. (1 *Chitty*, 647.) The demurrer was therefore properly sustained in the court below, and this motion must be refused.

Justices *Colcock*, *Johnson*, and *Huger*, concurred.



ANGUS M'EACHERN vs. JAMES G. COCHRAN.

A transaction between two parties in a judicial proceeding is not binding upon a third; therefore in an action for wages as mariner and master of the defendant's sloop, a decree of the admiralty between A. and the plaintiff is inadmissible.

THIS was an action of assumpsit for wages earned as mariner and master on board of the coasting sloop *Sally*, belonging to the defendant. In support of the charges for his services as mariner, the plaintiff offered a decree of the court of admiralty in the case of *Archibald M'Pharl* vs. *Angus M'Eachern*, master of the sloop *Sally*. By the proceedings in that case it appeared, on the application of the said *Archibald*, a common sailor, a summons was issued against the sloop. It further appeared that a libel was filed for wages by the said *Archibald*, and that afterwards, *Angus M'Eachern*, the plaintiff in this action, appeared and claimed the vessel. This claim was filed; and after the examination of witnesses upon interrogatories, the court decreed that the sloop should be sold, and the wages of actor and respondent, (the said *Angus M'Eachern*,) as seamen, should be paid. This decree the presiding Judge permitted to go to the jury, as *prima facie* evidence of the claim of the plaintiff.

A verdict was found for the plaintiff; and now a new

trial was moved for, on the ground that the decree ought not to have been received in evidence against the defendant, as he was not a party to it.

Mr. Justice *Huger* delivered the opinion of the court.

The general rule is well established; "a transaction between two parties in a judicial proceeding is not binding upon a third;" and the reason of the rule is very satisfactory. He who is not a party has it not in his power to make a defence, or to examine witnesses, or to appeal from a judgment which may be erroneous. The proceedings of the admiralty are *in rem*. The owner of the sloop was not constructively or absolutely present. He was not absent by default. He was in no respect a party to the suit. The plaintiff in this action was on the contrary both actor and respondent. The decree ought not to have been admitted in evidence. The motion for a new trial is therefore granted, unless the plaintiff shall remit so much of his verdict as was recovered for wages as a seaman.

Justices *Bay, Nott* and *Johnson*, concurred.

GEORGE VS. CATHERWOOD.

Three months notice is necessary to entitle a defendant to the benefit of the insolvent debtors act. It is so declared by the act, so ruled by this court in *Alexander vs. Gibson*, (1 *Nott & M' Cord*, 480,) and never doubted but in Charleston.

R.

EXRX. OF THOMAS PRICE VS. WM. P. YOUNG.

Where a demand on the drawer of a bill of exchange cannot be made, the law does not dispense with notice to the indorser. The circumstances which prevent the demand and notice of non-payment, should still be given. And such notice should be given in as short a period after ascertaining that the demand could not be made, as if the demand had been made, viz. as soon as shall be conveniently practicable.

Where the holder lived on James Island, and the drawer in Charleston, and the note became due on the 26th October, and notice not given until the 10th of November, the Court *Held*, that the notice was not given in time.

THIS was an action by the Executrix of the indorsee, against the indorser of a note. The note was made by *Bryer* to the defendant on the — *July*, 1816, payable 26th *October* following. *Bryer* died in *September*, 1816. *Price* died in the *June* preceding. Notice was given to the defendant some day between the tenth and fifteenth of *November*. The plaintiff and her husband lived on James Island and the defendant in town. There was some evidence or admission that the plaintiff went to the lower end of the island to spend the summer.

The question was the trite one of due diligence, which consists in a demand on the maker and notice to the indorser.

The plaintiff attempted to excuse herself on the ground that the maker died just before the note became due, and left no legal representatives on whom the demand could be made ; and that as a demand was not made, the notice was within sufficient and reasonable time.

The jury found a verdict for the plaintiff. The case was brought up by the defendant on the ground that legal notice had not been given.

Mr. Justice *Colcock* delivered the opinion of the court.

Where a demand can not be made, the law does not dispense with notice. The circumstances which prevented it and the notice are still required. It was the duty of the holder in this case, admitting that a demand could not have been made, to have given the defendant notice in as short a period after having ascertained that the demand could not be made, as she could have been required to do, if a demand had been made. Suppose the demand had been made on the 26th *October*, and no notice to the defendant had been given until the 10th or 15th of *November*, could this have been considered as a reasonable time,

when the parties were so contiguous to each other as to have enabled the plaintiff to have given the notice in five hours, or at most in one day? I presume not. The law is express that the notice shall be given as soon as shall be conveniently practicable. See the opinion of this court delivered by Justice *Cheves* in this case, January term, 1818. (1 *Nott & M'Cord*, 438.) In some cases it becomes a question whether it was practicable to have given an earlier notice than that which is in proof, and this depends on the local situation of the parties and the means of communication. Here they were a few miles apart, and a daily communication between the places of their residence: So that if the rule is to be applied in any case, it must be in this.

The motion is granted.

Justices *Bay*, *Nott*, *Huger* and *Johnson*, concurred.

Mr. Justice *Richardson* dissented as follows: This was an action of assumpsit by the Executrix of *Thomas Price* against the defendant as indorser of a promissory note drawn by *Lewis Bryer*, and payable 26th October, 1816.

Mr. *Rivers*, for the plaintiff, testified that Mr. *P.* the holder of the note, died in June, 1816. *Bryer*, the drawer, died in September following. He did not believe Mrs. *P.* looked over the papers of Mr. *P.* immediately after his death, if she had he had known it. He was present with Mrs. *P.* and assisted to examine the papers of Mr. *P.* in the November after his death; at which examination the note in question was found. At the request of Mrs. *P.* he presented the note to Mr. *Young* for payment between the 10th and 18th November, within a day or two after it was found, which was three or four days before Mrs. *P.* qualified as Executrix. After *Bryer's* death, it was thought he was insolvent. On his cross-examination, he said he understood the note had been settled. Mr. *Walker* and *W. C. Young* were sworn, but testified nothing material to the point now submitted.

The presiding Judge charged the jury that legal notice had not been given to the indorser to charge him.

The jury found a verdict for the plaintiff.

The defendant appeals on the ground that legal notice was not given to the indorser.

It appears from the statement of facts which appeared at the second trial, that the demand was made upon the indorser immediately after the note was found; and even before the plaintiff qualified as executrix of the payee: and that the maker never had any representative. In whom then was the laches? Not in the payee, for he was dead at the time of payment. Not in the plaintiff, for she was diligent even before diligence was incumbent upon her.—She could not demand payment of the maker, *Bryer*, for he was dead and had no representatives, and had been too a transient person. Could the plaintiff be rendered liable for neglect to *Bryer's* creditors? Surely she could not.—The want of demand on *Bryer*, and the consequent notice to the indorser arose from the death of both *Price* and *Bryer*, and there being no representative of the former till November, and never any to the latter, I think the verdict may be supported without violating the principles of law.

THE CITY COUNCIL OF CHARLESTON vs. THE REV'D.
DR. B. M. PALMER.

Under an ordinance of the city of Charleston, it is provided, "that the owner or tenant of any house, whose chimney shall take fire, and blaze out at the top shall be subject to a fine of not less than fifty, nor more than one hundred dollars." It appeared that the chimney in this case, blazed out in consequence of a negro servant carelessly throwing into the fire a band box filled with pieces of silk, crape, chip and shreds of work, and that the blaze was but momentary; the court *Held*, that the owner or tenant was still liable to the penalty.

Charleston district. Tried before the Recorder in the City Court, July, 1819.

THIS was a prosecution under the 32d section of the ordinance, respecting "fire-masters," which provides, "that

the owner or tenant of any house, whose chimney shall take fire and blaze out at the top, shall be subject to a fine of not less than fifty, nor more than one hundred dollars."

It was admitted that the chimney appeared to take fire, and blazed out at the top; but the defendant offered in evidence the written testimony of Miss *Bunce*, taken by consent. She stated that she was present when the chimney was said to be on fire, and she knows that the chimney blazed out in consequence of a negro carelessly throwing into the fire a band box filled with pieces of silk, crape, chip and other shreds of work; that the blaze was but momentary, and seen, she believes, by no other individual of the family but herself; that she does not recollect when the chimney was last swept, nor can she be positive that it was within a fortnight of the fire; that she believes the chimney to have been swept frequently, though she cannot precisely recollect at what intervals of time; that there are but two chimney funnels; that which blazed out from the combustible matter thrown into it, was the funnel of the kitchen.

Upon this evidence, the defendant contended that the chimney in the technical sense of the ordinance did not take fire; for it did not appear, by the evidence, that the soot was on fire, the flame which blazed out at the top being caused by the shreds which took fire; but that even, could the ordinance be extended to such a fire, that it could never have been intended to punish what did not arise from the negligence of the master; that the negligence or carelessness proved in this case was that of a negro slave, and the master could not be punished criminally for the acts of his slave.

The Recorder charged the jury that they must judge from the testimony how the chimney took fire; that it appeared immaterial to him whether the fire was occasioned by the soot or the rubbish stated in the evidence; that he did not think it necessary, under the ordinance, that negligence should be proved on the part of the owner or tenant; the ordinance did not, in its terms, embrace a case of neg-

ligence, but imposed a penalty to follow the fact of the fire, to excite the vigilance of house-keepers, and to reimburse to the city the expenses attending a fire; and in this case, though the act was said to be that of a slave, yet the master was responsible, as it could hardly be called a crime, but was an act which it was to be presumed was under the control of the master.

The jury found a verdict for the city of \$50.

From this the defendant appealed, and moved for a new trial, on the ground that the verdict was contrary to law and evidence.

Mr. Justice *Richardson* delivered the opinion of the court.

The new trial is refused by the unanimous concurrence of the court. The fact of the chimney's taking fire is supported by the evidence. It is not pretended that the ordinance is unconstitutional; and we are of opinion that the city Judge gave it the true construction. It is true that a master is not liable for the unauthorized acts of his slaves; but here, the slave merely made a fire in the chimney, which being foul, took fire, and blazed out at the top, and the thing complained of is, that the chimney was kept so foul as to take fire. Suppose a master were to set a spring gun, and his slave or other person accidentally touching it were to set it off, upon whose head would the consequences fall? Upon the master's clearly. So here the master suffers the chimney to become so foul, that the funnel became combustible, his slave accidentally increases the fire in the usual place, which ignites the soot, and the master's negligence is exposed. Suppose a visitor had caused the same blaze by throwing lightwood upon the fire, could that excuse the owner, when the true charge is for keeping a chimney so sooty that it blazed out by a reason of a fire made in the usual place? Surely not. It is the identical piece of negligence proved by the very consequence which the act punishes. The visitor, like the slave, would merely have unwittingly exposed the negligence of the owner.

but not have caused it. The having his chimney so sooty, as that when it took fire, it blazed out at the top, is the simple charge made out; and the argument is resolvable into this, that the foulness of the chimney being rendered manifest by the act of a slave, the charge is upon the slave, and not the master. But this conclusion is a plain mistake of the rule upon which the argument turned.

The motion was refused.

Justices *Johnson, Huger, Nott* and *Calcock*, concurred.

Gadsden, for the motion.

Toomer, City Attorney; contra.

HORISTON vs. CITY COUNCIL OF CHARLESTON, and its OFFICERS.

The jurisdiction of Charleston extends to the northernmost line of Boundary-street.

The act of 1764, giving powers to the commissioners of the streets in Charleston to make drains and assessments to pay for the same, has been repealed by the acts of 1783 and 1785; and the city ordinance of 1806, is now in force, and the only rule of action for the City Council in making drain assessments. And the court granted a prohibition to restrain the council from levying a fine assessed in a different manner from that provided by that ordinance. See *post*, 360, the case of *Cruckshanks vs. the City Council*. R.

CHARLES LINING, JOHN GLEN, and others, officers of the South-Carolina Bank, State Bank, Planters' Bank, and the Union Bank, in the city of Charleston, vs. THE CITY COUNCIL and WM. YEADON, Esq. City Sheriff.

By an ordinance of the City Council of Charleston, laying a tax upon different property, among many things, a tax was laid upon "all profit or income arising from the pursuit of any faculty, profession, or occupation, trade or employment," except "salaries of the judges or other public officers, exempted from taxation, or not taxed by the legislature, &c.; nor the income or profit of any person or persons rated at a less sum than \$ 800; and the second clause of the said ordinance then ordains that in "making the assessment on the real and personal property described in said ordinance, (excepting money at

interest,) the assessor shall estimate the same at one half the value thereof." The court Held, that the salary of an officer of the bank was included under the second clause as *personal property*, and that the tax could only be laid on the half of such salary, which half, if it should be less than \$ 800, would not be subject to the tax at all.

Charleston Court of Appeals, May Sitting, 1821. Motion for a prohibition to restrain defendants from levying a tax on the salaries of the Relators as officers of the said Banks.

Mr. Justice *Bly* delivered the opinion of the court :

THIS case came before me on the 20th of March last, when, after hearing of Mr. *Toomer*, the City Attorney, against the motion, and Mr. *Heath* and Mr. *Elliott* in favor of it, I was of opinion that the writ of prohibition ought to issue, and ordered it accordingly. The opinion I then delivered, I shall now read as the grounds upon which the opinion of this court is now founded.

The suggestion filed on behalf of these applicants states that they are clerks in several of the banks in the city of Charleston, and that in pursuance of a city ordinance, passed by the City Council for raising supplies for the year 1820, the city inquirer and assessor had assessed their several salaries or incomes at 1,600 dollars a year, and imposed a tax on one half thereof; that is to say, on the sum of 800 dollars of each of them; and that the city sheriff was about to levy and collect the same. That the said tax on 800 dollars is *not due* from each and every of them, as they conceive they are exempted by the said ordinance; as none of their salaries amount to 1600 dollars *per annum*, and as their cases come within the latter part of the first section of the said ordinance, which ordains that the said ordinance shall not be construed to extend to any income or profit, rated at a less sum than 800 dollars: and further, because the city inquirer and assessor is enjoined and directed in making his assessment on real and personal property described in said ordinance, to estimate the same at one half the value thereof; consequently the one half of their said salaries, if justly and truly rated, would be less than the sum of 800 dollars, the least or lowest sum

mentioned in said ordinance as the subject of taxation on incomes.

A further ground is stated by two of the petitioners, namely, *John Glen*, and *John A. Steel*; that they are not corporators residing within the bounds of the city, or liable to be taxed by the city ordinances. The suggestion therefore prays for a writ of prohibition to restrain the City Council and all its officers from proceeding to levy and collect the taxes abovementioned.

I have considered the different grounds in this suggestion as well as the arguments of the counsel on both sides. I have also considered the city charter, and the power of the City Council under it, and although there is nothing in the charter to restrain the wardens, or to limit the corporation from taxing incomes arising from professions and occupations within the bounds of the city, yet there can be no doubt but they may restrain and put limits to themselves and their own officers by any of their own ordinances, if they think proper; and this, it appears to me they have done by the ordinance in question. The first clause of which ordains that all landed property or real estate shall be taxed 100 cents on every 100 dollars of the value or estimate thereof, to be assessed by the city inquirer and assessor. That all personal estate, consisting of money, bonds, notes or other obligations, upon which interest has been received, (the funded stock of the United States, and the stock of this state excepted,) the property and stock of the Insurance Companies, and all stock in trade, shall be liable to a tax of 100 cents on every 100 dollars, to be assessed by the said city inquirer. Next, all profit or income arising from the pursuit of any faculty, profession or occupation, trade or employment, (except those thereafter mentioned,) shall, in like manner, be liable to pay a tax of 100 cents on every 100 dollars, to be assessed as aforesaid. The said clause then goes on, and after imposing a tax on slaves, carriages, and other articles, contains this proviso: *Provided*, however, that nothing in the said ordinance contained shall extend to the profit or increase of any mechan-

ic, arising from the particular trade he pursues, nor the salaries of the Judges or other public officers, *exempted from taxation, or not taxed by the legislature*; nor the clergy, nor school-masters; nor the income or profit of any person or persons rated at a less sum than 800 dollars.

Here then it is evident that the corporation has fixed bounds or limits to itself, so as not to subject any income or place of profit under 800 dollars to taxation. This sum is most unquestionably the *minimum* of taxation by this ordinance on incomes or places of profit: and the city inquirer and assessor is restrained from rating upon them a tax on any lower sum. And if any of the applicants had been rated at a lower sum than 800 dollars, there could not be any question but that such assessments would be null and void. But a difficulty has arisen on the construction of the second clause of the ordinance, which ordains that the city inquirer and assessor in making the assessment on the *real and personal* property described in said ordinance, (excepting money at interest,) should estimate the same at one half the value thereof. Upon the construction of this second clause, it has been contended by the counsel on behalf of the motion, that the city inquirer and assessor should not have made any assessment on any of these salaries, as the one half of all of them are under 800 dollars; (the highest of them being 1,300 dollars, and the lowest 950 dollars,) consequently that not one of them should have been rated for taxation, as the moiety of each of them was considerably under 800 dollars, the *minimum* of taxation mentioned in this second clause, taken in connection with the proviso mentioned in the first clause.

On the other hand, it was insisted on by the city attorney, that this second clause did not extend to *incomes or places of profit*, but to other subjects of taxation mentioned in the first clause, so as to leave all the salaries of the petitioners open to taxation, at their nominal values, in the same manner as incomes and salaries above 1600 dollars; and that such was the intention of the city council, and such the construction which should now be given to this 2d clause,

In considering this subject, it appeared to me to be a little extraordinary if the city council had really meant and intended to have taxed these salaries or incomes, at the whole of their nominal values, that they should not have explicitly said so, or made them an exception, (as they have done money at interest,) out of this 2d clause, which ordains, "that real and personal property shall be rated at one half the value thereof." But they have not done so; which leaves this 2d clause subject to a construction in law according to the legal import of the phrases made use of. From this view of the subject, therefore, I have no doubt, but that *incomes and profits, labour, wages or hire*, are included under the *nomen generalissimum* of personal property; for the right being attached to a man, and for which, if withheld from him, he has no other remedy, but by a personal action, may very properly and emphatically be denominated personal property, (as laid down in *1st Inst.* 118, also in *Burns Law Dict. Tit. Chattels*, also *Comyns Dig. same Title*;) and the more especially as the clause relating to profits upon incomes and professions, mentioned in the said first clause of the ordinance, immediately follows the tax upon lands, bonds, notes, and other choses in action, upon which the tax is imposed, and are all classed together, as liable to taxation: And the 2d clause does not distinguish between them, but makes the whole property real and personal therein described, rateable by the city inquirer and assessor at half their value only, which will include the incomes within the 2d clause. I am therefore of opinion that the prohibition should issue to restrain the city council and the city sheriff, *William Teadon*, Esquire, under them, from proceeding to levy and collect the said taxes imposed upon the incomes of the petitioners by the ordinance in question.

As to the point stated in the suggestion, relative to the two petitioners, who are not corporators or residents within the bounds of the city, it is not necessary for me to

give any opinion upon it at present, as I am decidedly of opinion their incomes are not taxable.

From this opinion Mr. *Toomer*, the city attorney, appealed to this court, where it has again been fully argued by council on both sides, and the majority of the Judges present, after maturely considering the case, are of opinion, that the foregoing decision made at chambers was a legal and correct one, springing out of the different clauses of the city ordinance itself, under which, the relators in this case have been taxed, and that there are no grounds for setting aside the writ of prohibition directed.

I am therefore of opinion that the motion should be discharged.

Justices *Huger*, *Gantt* and *Richardson*, concurred.

Mr. Justice *Colcock* dissented.

Toomer, for the motion.

Heath & *Elliott*, contra.



ABRAHAM MOTTE vs. ROBERT DORRELL.

Where a person gave a note of \$ 500, for valuable consideration, payable sixty days after date, and when it became due, in order to obtain the further time of sixty days, gave his due bill for fifty dollars, and took a renewed note for \$ 500, payable sixty days after date, the court *Held* the transaction usurious, and that the note of \$ 500, as well as that for \$ 50, was void under the Statute; for, it seems, every renewal of a note is a new contract.—(a.)

Charleston Court of Appeals, May Term, 1821. Motion for a new trial.

THIS was an action of assumpsit, brought by the holder of a note of hand against the indorser, tried before Judge *Bay*, in January Term last. The note was drawn by *George K. White*, at 60 days, for 500 dollars, in favor of *Robert Dorrell*, the defendant, and indorsed to the plaintiff. The hand-writings of the parties were admitted, and

also regular notice of non-payment to the indorser; and the plaintiff rested his case.

The defence set up was usury. That the note in question was a renewal of a former note for the same sum of 500 dollars; and that the plaintiff who was the holder of this original note, at the time when he consented to take this second note, required 50 dollars for his forbearance for 60 days, which was accordingly consented and agreed to by the drawer, Mr. *White*; when the latter note was drawn for the above sum, payable at 60 days. A due bill was reserved and taken by the plaintiff for 50 dollars for the forbearance above mentioned. And to prove this fact, the maker of the note, Mr. *White*, was offered as a witness. To his competency, the plaintiff objected:

1st. Because he, the plaintiff, under the act of assembly, offered to swear there was no usury in the note; and,

2dly. Because he was a party interested.

Upon which a release was tendered by the defendant to Mr. *White*, to remove all doubts as to his competency.

As this was an action against the indorser only, and the drawer was not a party to it, it appeared to the court that *White*, the drawer, who had in the mean time become insolvent, stood perfectly indifferent between the two parties in this suit, and on that ground was competent; but as a release had been given him by the defendant, it removed every ground of incompetency out of the way.

And as to the offer of the plaintiff to swear, under the act, that there was no usury in the transaction, the court was of opinion he was only permitted to be a witness under the statute, *in the total absence of all common law testimony*; but where there was legal evidence offered to be given in the case, his partial evidence of a denial ought not, according to the rules of law, to be admitted.

Mr. *White* was therefore sworn to give testimony. The witness then proved that the original note was fair in its origin between *Dorrell* and himself. But that to procure the indulgence of 60 days longer, after the note became due, he applied to the plaintiff, to whom the first note had

been indorsed, before it became due, and who was the *bona fide* holder of it, for leave to renew it; to which he consented on giving him 50 dollars for forbearance 60 days longer. That accordingly another note was drawn at 60 days, and indorsed by defendant, which was the one on which this action was founded for the like sum of 500 dollars, and at the same time, he, the witness, gave the plaintiff a due bill for the 50 dollars for this forbearance, which premium due bill was afterwards blended, with other transactions between them, and was now incorporated in a due bill for 100 dollars; but neither of them was the cause of action in the present suit. Mr. *White* further proved that the premium due bill still remained unpaid; and that he, himself, was utterly insolvent, and utterly unable to pay the same; but the plaintiff had a judgment against him for it. Mr. *Darrell* was a mere friendly indorser for him, and knew nothing of these transactions.

Christian M. Logan, a witness for the plaintiff, stated that he had been the broker who negotiated the business between the plaintiff and *White*, when the original note of 500 dollars was passed away to the plaintiff, who paid him dollar for dollar for the same: but he knew nothing about the renewal of the note on which this suit was brought.— That *White* once offered to mortgage property for payment of it, which the plaintiff refused, on the ground as he alleged, that *White* had no title to the property he offered to mortgage.

Here the testimony on both sides closed.

In charging the jury, Judge *Bay* told them that our act of 1777, changed the rate of interest from 8 to 7 per cent.; but in every other respect it was the same as the British act against usury; consequently all the British authorities in the books would apply in this country. That by our act of Assembly, whenever more than 7 per cent. per annum was reserved on any contract for forbearance, or giving day for the payment of money, it was usurious; and would not only render every such contract null and void, but would also subject the lender to treble the value of

the monies, goods, wares and merchandizes, or other things of value so lent ; one half to be paid into the treasury, and the other to the person who should sue for the same. That so strict was the act in this respect, that no shift, device or pretext whatever could elude or evade the beneficial effects of it. That with regard to the facts of this case, they were for the consideration of the jury ; and if they should be of opinion that this 50 dollar-due bill was given for forbearance money for 60 days, when this renewed note was given and accepted by the plaintiff, then in his opinion, it would constitute usury, whatever might be the form or pretext made use of to elude it, as they were contemporaneous debts ; one given for the acceptance of the other, which might well be considered as different parts of the same transaction. But that if the original note, which was fair in its creation, had remained in the plaintiff's hands, uncanceled and not destroyed, and this or any other due bill had been given for forbearance for 60 days, such due bill only would have been considered as usurious ; but the original fair transaction would have remained good and valid in law ; and this was the true distinction which would be found to run through all the cases in the books upon this subject : Whereas, on the contrary, it appeared in this case that the original fair note was given up or cancelled, and a new contract made by giving and taking this new note for 500 dollars, tinctured with the usurious transaction of this premium due bill, which, in his opinion, made the whole usurious.

The jury, without any hesitation, found for the defendant.

A motion was now made for setting aside the verdict, and for a new trial, on the ground of misdirection of the Judge in the court below, and that the verdict was against law and evidence.

Mr. Justice Bay delivered the opinion of the court.

I have again given this case the best consideration in my power since the argument ; and from a review of the

law authorities upon the subject, I am of opinion that there are no grounds for setting aside this verdict. One uniform principle seems to run through the whole of them, namely, that where the original contract is not usurious, it shall never be made so by matter *expost facto*, (*Buls. p. 17. 7 Bac. Tit. Usury, 200, also, Ord On Usury, 100 and 101, 1 Wm. Black. Rep. 462,*) as where a man lends money on a legal interest, and after a subsequent agreement is made for more interest, which is usury, that will not avoid the first contract; per *Holt*, Chief Justice. (*7 Bac. 200. Ord On Usury, 100. 1 Saund. 294. Crok. Eliz. 20.*) But where there be a corrupt agreement at the time of making the contract, or lending the money, then the bonds and all assurances are void. (*1 Mod. 69.*) So, in like manner in *2 Mod. 307*, it is laid down, that to avoid a security, by reason of usury, the contract itself must be usurious to make it void. And in *Hawk. P. C. chap. 82 and 21*, it is laid down that it is not material whether the payment both of principal and the usurious interest be secured by the same or different conveyances, but all writings whatever for strengthening such a contract are void. (*7 Bac. 200.*)

Now to apply the circumstances of this case to their legal principles, there can be no doubt, as I mentioned in my charge to the jury, that if the plaintiff had retained the first note in his hands, which was fair and good when drawn, and at the time it became due, had taken this premium due bill, or any other instrument for forbearance for sixty days longer, which was more than 7 per cent. for the use of the 500 dollars for that time, such due bill or instrument only would have been usurious, while the original note would have remained unimpeached in the hands of the holder. But here the original contract was rescinded, and a new one entered into, (for I take every renewal of a note to be a new contract,) and at the time when this new contract was made, this 50 dollar premium note was given for the forbearance of the payment for 60 days; and although it is made payable by a separate instrument made

eo instante, it must be considered as a part of the said new contract, which makes the whole usurious.

I am therefore of opinion that the rule for a new trial should be discharged.

Justices *Colcock*, *Nott*, *Huger* and *Gantt*, concurred.

(a.) *Quere?* If it should not be so considered in cases of judgments confessed, and mortgages given to secure an indorser for indorsing notes to be renewed in bank? Persons are daily in the habit of giving such judgments and mortgages, and we have always thought that they would be postponed to subsequent judgments or mortgages given for a debt actually due, and more especially after the original note, for the indorsing of which such security had been given, has been changed, and, by a renewal, a new one substituted. (See *Roberts on Fraud*. Conv. 489.)—R.

THE STATE vs. MRS. COLLINS.

A feme covert, living alone from her husband and not under his power, is liable to an indictment for retailing spirituous liquors without a license.

Motion for a new trial.

THIS case came up by way of appeal from the City Court, in which an indictment was found against the defendant, *Mrs. Collins*, for selling spirituous liquors in the city of Charleston without a license. The selling of the liquors was very clearly proved against her; and it was also proved by *Mr. Roach*, the city treasurer, that she had no license to retail liquors; and further, that her landlord, *Mr. McGuire*, in whose house she hired a shop or room, had never taken out such license.

One of the witnesses proved that he had heard she was a married woman, but where her husband was, or whether he was dead or alive, he did not know.

The counsel for the defendant contended that this indictment would not lie, because the defendant was a married woman. That although the mode of proceeding under the statute was by indictment, yet in principle it was to be

regarded as analogous to a *qui tam* action, which was a civil remedy, and that in such an action, the husband must be joined with the wife.

After argument in the City Court for and against this objection, the Recorder overruled it, and decided that a feme covert was liable for any offence not capital against the common law or statute; and if the offence be of such a nature that it might be committed by her without the consent of her husband, she might be alone prosecuted for it by indictment. And in support of this doctrine, he relied upon 1 *Hawk. P. C. p. 4, sec. 13*, and the various authorities referred to by that able writer on criminal law.

With respect to the *qui tam* action, which was so much relied upon by the defendant's counsel in the argument, the Recorder observed, that he regarded that altogether as a civil proceeding to recover a pecuniary penalty, in which the rule was different from that on an indictment, which was founded on an offence committed under such circumstances as precluded the supposition of the husband's coercion, as he had never been seen with his wife; or if a marriage ever had existed, he had not been seen for so great a length of time, that he might be considered as dead or out of the country, when the indictment was preferred.

The jury, therefore, upon this opinion and charge of the Recorder, found the defendant guilty.

The present therefore was an appeal from the charge of the Recorder, and a motion for a new trial, upon the following grounds:

1st. That the prosecution being in the nature of a penal action for the recovery of a penalty, the defendant, by the form of an indictment, could not be deprived of the common law right which she possessed in such action.

2d. That the husband of the defendant will be subjected to the payment of a penalty in an action he was not called upon to defend, and be punished in a prosecution to which he was not a party.

3d. That the state having admitted Mrs. Collins to be a married woman, it was incumbent on it to prove that she

lived separate from her husband, if such an allegation was necessary to render her liable to be sued alone in this form of indictment ; as the law presumes man and wife to live together, until the contrary is made to appear.

Mr. Justice *Bay* delivered the opinion of the court.

Upon the first ground, I perfectly coincide with the Recorder, that this prosecution is not in the nature of a penal action for the recovery of a penalty, which is a civil remedy of a private nature, like every other for the recovery of a debt or specific sum. But it is a prosecution of a public nature for an offence against the community ; and there can be no doubt but that an indictment will lie for offences of this kind against the police and good order of the country, both by the common and statute law. The authority in *Hawk.* 64, referred to by the Recorder, is clear upon that point ; and those he refers to, (4 *Black.* 5,) lay it down, that a crime or misdemeanor is an act committed or omitted in violation of a public law, either forbidding or commanding it ; and this definition, he says, comprehends both crimes and misdemeanors, though in common usage, the word crimes is made to denote those of a deeper dye, while the smaller or lesser faults are comprised under the gentler name of misdemeanors only. And he observes further, " that one of the objects of the law is, to secure the public peace and benefit of society, by punishing every breach or violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole." (4 *Black.* 7.) And again, it is laid down by the same author, (page 302,) that an indictment will lay for any crime or misdemeanor preferred or presented upon oath by a grand jury.

Whatever doubt might have been entertained upon the subject matter of this prosecution under the provisions of the act against billiard tables and selling liquors, before the case of *Milfred*, that case has put the *qui tam* action at rest in this state, and settled the point that an indict-

ment will lay for an offence against any of the public acts or laws of the state.

The second point or ground of objection in the brief is, that the husband of Mrs. *Collins*, the defendant, might be subjected to a penalty and prosecution to which he is not a party. And here I must observe that it appears to me that the counsel for the defendant has assumed a fact in this case which does not appear to me to have been proved in it; to wit, that defendant was a married woman, and was under coverture when this prosecution was commenced. The only proof upon this point is that of Mr. *Wray*, who says he had heard that she had been married; but where this husband was, or whether he was living or dead, he did not know. Now he does not mention from whom he had this report, or that it was commonly reported and believed that she was a married woman in the neighbourhood; or whether, if it was true, that the husband had ever been seen in this country, or if he had ever been in it, whether he had not gone off, and left and abandoned her. For ought that appears to the contrary, it might have been from Mrs. *Collins* herself he heard this story, who it appears had a son, whom she might have been desirous of having it believed was born in lawful wedlock. I think the proof on that head was very vague and uncertain. But admitting it to be true for argument sake, and it does seem to have been admitted, as the opinion of the Recorder and the arguments of the Attorney General were principally bottomed upon that presumption, that she had been a married woman, still I am of opinion it does not alter the legality of the conviction. For it was well laid down by the Recorder, in his charge to the jury, that a feme covert was liable for any offence not capital, or in other words, for any misdemeanor which she might commit without the presence of her husband or his coercion. For Mr. *Hawkins* expressly lays it down in the authority referred to by the Recorder, "that a feme covert shall answer as much as if she were sole, for any offence not capital against the common law or statute; and if it be of such a nature

that it may be committed by her alone, without the husband, she may be punished for it without the husband by way of indictment; which, being a proceeding grounded on the breach of the law, the husband shall not be included in it for an offence to which he was no wise privy.— The same doctrine is laid down in 1 *Bac. Tit. Baron and Feme*, page 487, viz. That a feme covert generally shall answer as much as if she were sole for any offence, not capital against the common law or statute, and that she may be prosecuted for it by way of indictment; the husband shall not be included in it for any offence to which he was no wise privy; and refers to *Hawk. p. 64, 96, 71. Reeves, 72.* And in 11 *Co. 61*, it is laid down that the husband is not liable to a forfeiture recovered in an indictment against the wife.

As to the third and last ground in the report or brief, That as the state had admitted Mrs. *Collins* to be a married woman, it was incumbent on the state to prove that they lived separate.

If this kind of proof had really been necessary on the present occasion, I do not see how that fact could have been better or more satisfactorily proved, than it was by Mr. *Wray*, the first witness, who swears, that he had been in the habit of buying spirituous liquors from defendant; that she complained to him that people did not pay her for them punctually, &c. and further, as to the husband, that he did not know where he was, whether living or dead. It did not appear that he ever saw him, or whether, if he had ever been in this country, he had not gone off and left it. If this be not sufficient proof of his not living with her, it is difficult, if not impracticable, ever to prove such a fact.

Upon the whole of this case therefore, under all the circumstances of it, I do not see any grounds for calling in question or setting aside this conviction, or granting a new trial.

I am therefore of opinion that the motion should be dismissed.

Justices *Colcock, Nott, Huger* and *Gantt*, concurred.

CRUIKSHANKS *vs.* THE CITY COUNCIL.

In this case the court decided the same point, in relation to the acts and ordinance, as is decided in the case of *Horiston vs. City Council*, ante 345; also, that,

The power of the City Council to lay taxes and assessments, for the purposes of pavements, drains, &c. in Charleston, without the intervention of a jury, is as constitutional as the general power of the Legislature to lay taxes upon the people of the state. It is a part of the general sovereign power conferred upon the corporation.

Under a general power to the City Council to make such assessments on the inhabitants, and to appoint all such officers as may be necessary and requisite for carrying into effect the power conferred, it is not a valid objection to an assessment that it was made by the officers of the corporation, and not by the corporation itself; for the City Council, within the limits of the city, is in the nature of a legislative body, for the purpose of devising and making all by-laws, and those acting under them, ministerial officers or agents, for carrying them into execution; besides these assessments are submitted, first, to the approbation of the Council and approved, and any one has a right to make his objections before the Council.—R.

MARSH and HOWERIN *ads.* EX'ORS. and EX'RIX. of Dr. BLYTHE.

Where two vessels were passing in a narrow channel (about 400 yards across,) both going the same way, and it became apparent that they were about to run afoul of each other, it was the duty of the vessel to windward to keep away; especially when she was warned of the danger; and the owners of such vessel not giving the way, and who might have given the way, are liable for the losses sustained by the vessel so run afoul of.

Where two vessels meet in such a situation *that neither can avoid the collision*, it is a danger of the sea, *but not otherwise*.

Whether peril of the sea or not, is a question for the jury. (*a.*)

A motion in arrest of judgment, because the declaration neither stated the day nor the year, when the wrong complained of was committed, and that it did not state that any definite quantity of rice was lost, but merely stated that — bushels were received on board and lost, comes too late after verdict. The advantage should have been taken by pleading. The day of the loss and the quantity lost were proved on the trial.

Motion for a new trial and in arrest of judgment. Verdict for the plaintiff. Tried before Mr. Justice Colcock.

THIS was an action of assumpsit against *Robert Marsh* and *James C. Howerin*, by the executors and executrix of *Joseph Blythe*, to recover the value of a cargo of rough rice, shipped at *Georgetown*, by the late *Dr. Blythe*, on board of a vessel owned by the defendants, called the *Nonsuch*, and chiefly lost on the voyage to *Charleston*, by the sinking of the vessel.

The plaintiffs adduced the bill of lading, or receipt for the rice, signed by the master of the vessel; by which he engaged to deliver the rice in *Charleston*, "the dangers of the sea excepted." They adduced, also, an affidavit of *John Wales*, a mariner on board of the *Nonsuch*, who swore that he had been accustomed to the sea in the character of a sailor for twenty-two years, and that he was a seaman on wages on board the *Nonsuch*, a coasting schooner, commanded by captain *Patch*, on the 15th May, 1815, when she was sunk at *Cat Island* by the schooner *Planters' Friend*, commanded by captain *Howerin*. That the said schooner, the *Nonsuch*, was loaded with rough rice, and was bound to *Charleston*; and the other schooner, to-wit, the *Planters' Friend*, was also loaded and bound to *Charleston*. That when off *Cat Island*, the schooner *Nonsuch* was not able to weather the point of land ahead, without tacking, the wind being about east, and was sailing with her starboard tacks on board, and the *Planters' Friend* with her larboard tacks on board; and that he thinks the *Nonsuch* was going at about the rate of three knots, and the *Planters' Friend* full in the wind, and with the tide at about seven knots; and at the time when he first discovered danger, he informed captain *Patch* of it, who said he believed he could clear her, the *Planters' Friend*. But it at length became manifest that some injury would accrue if both vessels kept their course, and this deponent called loudly and often to the captain of the *Planters' Friend* to bear away, who returned no answer; that it was then fully in the power of the captain of the *Planters' Friend* to have avoided the accident, but it was then too

late for the captain of the *Nonsuch* to have got out of the way : that the *Planters' Friend* run her bow on the *Nonsuch* amid ships, and in consequence of such running upon the *Nonsuch*, she filled with water and sunk immediately ; the crew not having time to save their clothing.

Mr. *Moses Myers* proved that it took from 18 to 27 bushels of rough, to make a barrel of clean, rice, according to the quality, and that the rice must be very good if twenty bushels of it turned out a barrel.

Mr. *John M. Taylor* was next sworn, who stated that the planter's usual calculation was twenty bushels to the barrel.

It was admitted that the defendants were owners of the vessel *Nonsuch*.

On the part of the defendants, it was admitted that 500 bushels of the damaged rice were offered to Dr. *Blythe*, and that it was afterwards sold at 15 cents per bushel, in *Georgetown*, which was all that was saved.

Captain *Benjamin* was sworn, who stated that he had been about nineteen years in the trade, and that he commanded a coaster ; from his knowledge of the place, he knows how they were situated ; i. e. the *Nonsuch* and the *Planters' Friend*. That the vessel which was before the wind should have given way ; that this is the universal practice, because the vessel so situated, is under perfect command. That in his opinion the *Planters' Friend* was in the wrong ; that he would not have thought himself exempt from liability, but would have pursued the other vessel ; that is, the usual course. That it was not a sea danger ; " if so, we had better stay at the wharves, for we are constantly tacking." He further stated, that *Patch* and the other were young and inexperienced. That he thought he would have done as *Patch* did ; also, stated that about 6 1-4 or 7 cents was the freight for rice at that time ; and observed that the two captains stood upon etiquette ; meaning that he believed they were rather punctilious about giving way. Captain *Tarbox* was next sworn, and deposed that " he saw a little of it." The vessels were

between *Cat Island* and *Musquitoe Creek*. That the *Nonsuch* was about four hundred yards ahead, and about fifty yards from the shore ; that the channel was very narrow, and that the *Nonsuch* had no head way, no chance to do any thing, nor could she get out of the way. That the *Planters' Friend* was full in the wind, and went into the *Nonsuch* in stays. That the *Planters' Friend* could have avoided the *Nonsuch* easily. That he was about 300 yards off, a little above major *Brown's* place. Witness said that he was a pilot, and that the channel was about 400 yards wide at that place.

Captain *Howling* was next brought forward, and swore to the following facts : That he had been a branch pilot about eight years. He knew the place described by the affidavit, and that the channel was narrow ; that he thought *Patch* did all he could, and that the *Nonsuch* was a heavy boat, and flat bottomed ; that he *thought it a danger of the sea, if it could not have been avoided*, (alluded to *Patch*, not to the captain of the *Planters' Friend*,) and that he thought the owners of the *Planters' Friend* liable.

Captain *Lehre*, the next witness, stated that he had been all his life in this trade ; that it was the duty of the vessel behind to keep away ; that he would have done as *Patch* did ; that he should *think it a danger of the sea* ; and that he knew *Patch*, and thought him capable of this navigation. On his cross examination, he said he thought it a danger of the sea, *because it was an unavoidable accident* ; that he never knew a case of this kind before, and knew no practice on the subject.

Captain *Wilcox* was sworn next, and deposed that he had been five or six years in the trade ; that the channel was narrow, being not more than a half mile wide ; that it is impossible, without being present, to say whether *Patch* could have avoided the accident ; he thought from the representations of the case he would have done what *Patch* did ; and that he should call it a danger of the sea, *unless the man ran wilfully into him*. On his cross examination,

he said that he never knew of a case exactly like this. The verdict was for the plaintiff.

The defendants now moved for a new trial, on the following grounds :

1st. That the presiding Judge misdirected the jury in stating to them that when two vessels meet in such a situation *that neither can avoid* the collision, it is a danger of the sea, *and not otherwise*.

2d. That the jury, in calculating their verdict, committed a mistake, inasmuch as they founded their calculation of the value of the rice lost, upon the presumption that twenty bushels in the rough were equal to a barrel of six hundred weight of clean rice, which was unreasonable as a general estimate, and not warranted by the evidence of the case.

3d. That the jury have, by their verdict, determined that the defendants shall pay for a quantity of empty barrels, for the carriage of which, no freight was expected.

4th. That the verdict was otherwise against the law, and evidence of the case.

The defendants will also move the Constitutional Court for an arrest of judgment on these grounds :

1st. That the declaration neither gives the day nor the year on which the wrong complained of was committed.

2d. That the declaration does not state that any definite quantity of rice was lost, but merely states that — bushels were received on board, and lost.

Mr. Justice *Colcock* delivered the opinion of the court.

In this case, the only question of any importance is, whether the defendants are exempted from their responsibility by the peculiar circumstance attending the case? Whether it was the result of inevitable accident, or as the defendant's counsel put the case; whether it is "a danger of the sea," within the meaning of the exception contained in their receipt? I consider the terms "inevitable accident" and "perils of the sea" as convertible terms, so far as they relate to the responsibility of the carrier to the owner. In

a large sense (says *Marshall*,) all the accidents or misfortunes to which those engaged in maritime adventures are exposed, may be said to arise from the perils of the sea; and conformably to this idea, a loss by capture was formerly holden in our courts to be a loss by the peril of the sea; but in more modern times, it has been found convenient to distinguish the losses to which ships and goods at sea are liable, by the more immediate causes to which they may be more particularly ascribed. In this view, losses by the perils of the sea are now restricted to such accidents or misfortunes only as proceed from mere sea-damage; that is, such as arise *ex vi divina*, from stress of weather, winds and waves, from lightning and tempest, rocks and sands, &c. A collision therefore which would excuse, must be such as could not be avoided by human prudence and skill. In other words, it must be the effect of the *vis divina*; the operation of wind and waves combined to a degree not to be resisted by human skill or forethought; as if two vessels meet in a storm at night, or even in the day, when there is clearly no blame attributed to either side. Formerly, by the maritime law, as stated by *Valin*, *Pothier* and *Emerigon*, under such circumstances each vessel bore a part of the loss. But by the law of England, if it appear to have been unavoidable, without fault in any one, the owner of the ship or cargo damaged must bear the loss. (2 *Marsh.* 493.) But when resulting from the want of diligence or skill in either, it makes the common carrier liable. If the captain of the vessel which causes the injury be in fault, he is answerable to the owners of the injured vessel, and they to the person for whom they carry. And upon examination, it will be found that the cases so strongly relied on, on the part of the defendants, support this doctrine.

The case of *Pickering* and *Barclay* did not in fact turn on this point. It was decided early in the reign of *Charles the First*, when capture or destruction by the king's enemies was comprehended in the words "perils of the sea," and it was determined that the owners were not answerable.

ble, because "the taking by pirates was a peril of the sea." (*Abbott*, 267.)

The case of *Bever* and *Tomlinson*, was the case of a vessel designedly struck by the vessel of an enemy; the case never came to judgment, but Mr. *Abbott*, in speaking of it, says, the express exception afforded room to contend that the exception of the king's enemies, which arises out of the general rule of law, was meant to be excluded in the particular instance; so that this was not treated as a case of collision.

The case of *Baker* and *Fisher* was considered as a case of collision; but it is expressly said that it was a matter of doubt whether the master of the defendant's ship ought to have understood the course which the others would pursue and borne to leeward to avoid them. That no blame was considered as imputable to him for not having done so; nor was any fault attributable to the persons who had the conduct of either of the other ships. (*Abbott*, p. 209.)

Even a loss, happening from a natural cause, will not always be considered as within the exception "perils of the seas." If a vessel strike on a shallow or rock, the situations of which are generally known, it may be a question whether it was not the fault of the master that the vessel went on it. If she be forced on a rock by adverse winds, or if a shallow be suddenly created by tempest or other violent convulsion of the sea, the owners would be excused. But where it might have been avoided by skill and prudence, they would be liable. (*Abbott*, 210.)

But the question was left to the jury, according to the decision of the Constitutional Court in this very case, (which is supported by the doctrine, as laid down in *Abbott*, 204,) with an opinion, that the facts well warranted them in finding a verdict for the plaintiffs; and I think the case can admit of no doubt. (1 *Nott & McCord*, 170.) By a reference to the testimony, it will be seen that every witness who gave an opinion on the point, said it was the duty of the captain of the *Planters' Friend* to have borne away; and that he could easily have done so, she being

full in the wind. Some of the witnesses thought it a danger of the sea; but that opinion was not to influence the jury; because of the limitation which was given to it by most of the witnesses, "if it could not have been avoided," which was in fact the whole question. But captain *Benjamin*, the oldest and most experienced seaman, who was examined, said he could not think it a danger of the sea; "if so, they had better lie at the wharves; for in that navigation they were always tacking." Both captains were young and inexperienced, and no doubt stood on etiquette; and it is impossible to read the protest of the seaman *John Wales*, who was on board the *Nonsuch*, without coming to that conclusion, and that in truth captain *Patch* himself was guilty of great negligence; for he, the witness, repeatedly warned him of his danger, and his answer was, he thought he could clear her. He was bound to be sure of it. It was better to lose a little way than run the risk; and in passing the other vessel, he might then have conversed with the captain. It is true, that at the last moment, he could not have avoided the other vessel, though he could have come to, even the moment before they struck; but he was blameable for not using more caution at an earlier period.

As to the other two grounds, the court cannot ascertain by what data the verdict was found, and therefore they cannot perceive that the jury have allowed freight for empty barrels, (if indeed they were empty,) or allowed too few bushels of rough rice to the barrel.

The motion in arrest cannot prevail, because it is too late after verdict to complain of a blank in the declaration as to the date or the number of bushels; for that is cured by the verdict. If the defendant wished to take advantage of it, he should have done so by his pleadings. It was proved on the trial on what day the loss occurred, and what were the number of bushels lost.

The motion is refused.

Justices *Bay*, *Nott*, *Huger* and *Gantt*, concurred.

(a.) *Marsh and Howerin* ads. *Blythe*. (1 *Nott & McCord*, 170.)

JOHN J. SMITH *ads.* RICHARD B. SCREVEN.

Where money is paid by a debtor to a creditor who has several demands against him, and no directions given how it shall be applied, the creditor may apply it as he pleases; therefore, where the creditor holds two bonds of his debtor, both due, and payable with interest, and money be paid him without directions as to its application, he may apply it to the part extinguishment of the principal and interest due at the time on both bonds; and he is not bound to apply it to one bond until it be satisfied, and then to the other.

Assumpsit for money said to be overpaid by the plaintiff. Plea *non assumpsit*, and a balance still due the defendant. Tried before Mr. Justice Gantt.

IN this case, it appeared that the plaintiff had, at two different times, borrowed money from Mrs. Ann Joyner, and had, at each time, given his bond for the payment of the same, with interest at a future period. During the lifetime of Mrs. Ann Joyner, a separate suit was brought on each bond, and verdicts, &c. obtained. In 181-, a payment of \$707, was made by R. Lubbock to Mr. Porteous, the plaintiff's attorney, on account of these executions, without any directions from the defendant or the said R. Lubbock, as to its application. It was therefore applied to the principal and interest due at that time on both bonds, (as per statement sent.) The subsequent payments were applied in the same manner, until one bond was paid off. From the indulgence which was given by the plaintiff, it became necessary to revive the judgment by *scire facias*, after the present defendant, and who was one of the executors of Mrs. Joyner, had qualified on the will. The action was brought on one judgment only, as the other was considered paid. No objection was made at the time to the application of the different payments to the interest due on both bonds, nor for a long time afterwards. There was still a balance due of \$300 4 on the last judgment.

In 1819, this suit was brought to recover a sum of money overpaid, as it was said, by the defendant.

The ground on which it was urged he was entitled to a recovery was, that the payments should have been applied

to one of the bonds until that was extinguished, and not to the interest due on both.

Verdict for the plaintiff.

The present motion for a new trial was made on the following grounds :

1st. Because the charge of his honor the Judge was contrary to law, inasmuch as the creditor had a right so to apply the payment, as to extinguish the interest due on both bonds ; particularly so, when he is not specially directed in what manner the payments should have been applied ; and his honor decided that the payments should have been applied to the satisfaction of one bond before any part of the payment should be appropriated to the other ; thereby leaving the interest unsatisfied.

2d. Because the jury, if the principle on which the court decided be correct, did not allow the balance due on the bond on which but few of the payments had been made ; which, if they had so done would have reduced the verdict to a sum less than \$85 71 cents, and consequently summary process costs only would be allowed.

3d. Because, by the verdict of the jury, the plaintiff in the present action has been permitted to appropriate the payments on the two bonds to promote his own interest, and not to answer the ends of law and justice.

Mr. Justice *Colcock* delivered the opinion of the court.

Where money is paid by a debtor to a creditor who has several demands against him, and no directions are given how it shall be applied, as a general rule, the creditor may apply it as he pleases. (2 *Strange*, 1194. *Godard vs. Cox*, 14 *East*, 242.) Both the bonds bore interest. Both were due. I therefore think the defendant made a just as well as legal application of the money.

But it cannot be contended with any hope of success, that the plaintiff should recover in the case ; for on the revival of the second judgment, a statement was given to him, by which he must have known and seen how the money had been applied. He is then considered as having

acquiesced in the application of the money; for if he did not, why not then object? The court had the power to have relieved him, and if he had been entitled to any relief, would, no doubt, have granted it. Even in cases where one has a receipt, which he fails to produce on the trial, he is not permitted to recover the amount by action after a verdict has passed against him; (*Hampton and Marriott, Grimke, &c.*) because this would tend to endless litigation.

The motion is granted.

Justices *Richardson, Huger and Bay*, concurred.



S. R. CANNON, indorsee, vs. JAMES BEGGS.

A note in these words, "due T. N. on demand, three hundred dollars, &c." Held that interest would only commence from the time of a demand. (*a.*)

Tried before Mr. Justice *Colcock*, at Barnwell, April, 1821.

THIS was an action of assumpsit on a note, in the following words, viz. "Due *Thomas Newman, Esq.* on demand, three hundred and ten dollars, 1st November, 1810," signed by the defendant, and indorsed to the plaintiff. On this note there was a credit for \$109 50-100, paid 5th December, 1815.

The only question in this case was, when interest should commence?

His honor, the presiding Judge, charged the jury, that interest would only commence from the time of a demand made; of which the only evidence was, the payment on the note, from which it may be inferred or presumed a demand was made, and the jury found interest from that time only.

The plaintiff appealed, and moved for a new trial:

1st. Because his honor erred in charging the jury, that a demand was necessary to entitle the plaintiff to interest.

2d. Because this note or due bill, (differing from com-

mon notes, payable on demand,) acknowledged a debt due at the time, and therefore ought to have carried interest; since, (as it is submitted) the demand had relation to the payment of the principal, and not to the accruing of interest.

Mr. Justice *Colcock* delivered the opinion of the court.

There being a difference of opinion on this subject, I have been led to investigate it with some diligence, and the result is, that I am confirmed in the opinion given below, that the plaintiff is entitled to interest only from the time of the demand. Mr. *Chitty*, in his *Treatise on Bills*, speaking of interest, says, "when interest is made payable by the bill, &c. itself, there is no doubt of its being recoverable; and as, according to several cases, is, in general, payable on all liquidated sums, from the instant the principal is due, it is recoverable on all bills of exchange and notes of hand, payable at a day certain or *after demand*." If payable *on demand*, (6 *Modern*, 138. 5 *Vesey*, Jun. 803,) in some cases, it is said that interest is payable from the date of the note, &c." He then observes, "and it is generally understood that a bill or note carries interest only from the time of the *demand* of payment, unless the delay were occasioned by the defendant; as his being out of the kingdom at the time it was due;" and then follows the reason on which the doctrine is founded; "for interest being in the nature of damages for non-payment, it would be unreasonable to suffer the holder, by his own laches to acquire a benefit, and to subject the drawer, acceptor or indorser to damages, when he was guilty of no default," (*Chitty*, 318, 295;) and for these positions, refers to high authority, which upon examination, will be found to support them. In 7 *Term. Rep.* 124, (*Farquar vs. Morris*,) in a case on a bond in which no time of payment was mentioned, and no interest required, the court said the debt is due at the date, and interest must be calculated from that time. The first position is also to be found in the case of *Thompson vs.*

Ketchum, (8 *Johns. Rep.* 189, 192;) but these were not cases payable on demand. Nothing was said as to any time or place of payment, and in speaking of liquidated demands drawing interest, the same thing is meant.

Where two sit down to adjust an account, and strike a balance, and it is done, and the balance acknowledged without saying any thing about payment, the debt is due immediately, and interest allowed from the time. In 2 *Black. Rep.* 761, *Blaus, assignee of Bradley, vs. Henricks, et. al.* which was a case on an account stated, it was decided, that interest from the date be allowed; and in that case, *Plowden, Blackstone and Nares*, say interest is due on all liquidated sums from the instant the principal becomes due and payable; therefore, on all bills of exchange, notes of hand payable at a certain day, or after demand, if payable on demand, interest is due: So also, in the case of *Brass Crosley vs. Lord Mayor of London*, (2 *Wilson*, 206,) it is there apparent that a note payable on demand is not considered as carrying interest from the date, and is distinguished from cases where no time is mentioned.

But it is contended that it should carry interest from the date, because it is a debt due *in presenti*, the *solvendum in futuro*.

I ask if this is not equally the case with every note of hand in which the maker says, I promise to pay, one year after date, for value received? Is not this as much an acknowledgment of a debt immediately due? There is a promise to pay, and an acknowledgment of value received. The debt then exists at the date of the note. But in such case interest is allowed only from the time the note is payable. Why not apply the same principle to the due bill, which is also payable at a future time, viz: on demand? Is it now a bill of exchange? Here the note was immediately transferred by *Newman* to *Cannon*; it was a draft on himself, payable on demand. Had it been on his banker, there could have been a doubt that interest would not be allowed until the demand. Why? Because

it is said the drawee undertakes to demand: So in this case, I say the payee, by the terms of the contract on the due bill, undertakes to make the demand.

Justices *Richardson, Gantt and Bay*, concurred.

(a.) It has usually been held on the circuits, to commence from the date. R.

JOHN DIXON & Co. Assignees of the City Sheriff, vs. M.
E. VANEZARA.

Where a debtor, in the prison bounds, petitions for the benefit of the *insolvent debtor's act*, and submits his schedule, and a suggestion of fraud is filed against him, under which he is found guilty by the jury and remanded to gaol, the bail is thereby discharged; for by such false schedule he is disabled from taking the benefit of either the *prison bounds act* or the *insolvent debtor's act*.

It seems that wherever the law interferes, and in any manner takes the principal from the custody of the bail, it is considered as a surrender.

THIS was an action of debt brought by the plaintiffs; the assignees of the sheriff, against the defendant, as security of *John Helfrid*, on a bond taken by the city sheriff, pursuant to the directions of the *insolvent debtor's act*; the condition of which was that *John Helfrid* should remain within the rules, limits, or bounds of the gaol, and should within forty days from its date, render to the clerk of the City Court a schedule on oath of the whole of his estate, both real and personal, or so much thereof as would satisfy the debt for which he was arrested.

The plaintiffs in their declaration set forth, that *John Helfrid* applied in the usual manner for the benefit of the *insolvent debtor's act*; that the plaintiffs filed a suggestion of fraud against him, under which he was, by the jury, found guilty; that he was consequently remanded to gaol, that being "recommitted to the bounds, limits and rules of the gaol of Charleston district, there to be held in the custody of the said *M. E. Van ezara*, his bail, for the said limits and bounds, the said *M. E. Van ezara* not regarding her duty as bail for the said rules, limits and bounds of

the said gaol for the said *John Helfrid*, on the — day of —, in the year —, freely and voluntarily suffered and permitted, without the leave or licence, and against the will of the said *John Dixon & Co.* the said *John Helfrid* to escape and go at large out of the said rules, limits and bounds, and out of the custody of her, the said *M. E. Vanezara*, wheresoever the said *John Helfrid* would, without restraint, and whereby the said writing obligatory became forfeited."

The defendant pleaded a general demurrer to the declaration, and contended, that she was not liable,

1st. Because the bond taken by the city sheriff was void, as he had no authority by law for taking such a bond.

2d. Because by the order of the court, *John Helfrid* was remanded to gaol, by which the security was released from all further responsibility.

3d. Because if the suit could be sustained, a *scire facias* ought to have been brought, and not an action of debt, upon the bond.

As the council on both sides declared their intention to appeal, his honor Judge *Drayton*, the Recorder, decided the case *instantly*, and sustained the demurrer upon the first and second grounds taken in the argument.

Mr. Justice *Colcock* delivered the opinion of the court.

In this case the court concur with the Recorder on the second ground, that the bail was released from all further responsibility by the recommitment of the principal to gaol. The acts of 1759 and 1788, were intended for the relief of the poor and unfortunate debtors who might be disposed to make a fair and just surrender of all their property, or so much as might be necessary to pay the debt on which they should be confined. But while it provides for the relief of such as are honest, it protects the creditor against the machinations of the dishonest. By the third section of the *prison bounds act*, all prisoners taken in *execution*, shall be entitled to the bounds, on giving bond to remain within them, and also within *forty* days to

make a schedule on oath or affirmation of his or her whole estate, or so much thereof as will pay and satisfy the sum due on the *execution* on which he or she shall be confined, (*Grimké, P. L. 456 ;*) and the 7th section declares, that if the schedule be not made, the party shall no longer be entitled to the bounds ; and then it proceeds to say, if it be suspected that the return is false, the Judge shall impanel a jury to try the fact. The tenth section then declares, that whoever shall make a false schedule shall be deemed guilty of perjury ; shall be liable to be again arrested and disabled from taking the benefit of *that act, or the insolvent debtor's act*. From which it is clear that the principal was properly remanded to gaol, and being so legally taken from the custody of his bail by the authority of law, she was thereby released from further responsibility. Wherever the law interferes, and in any manner takes the principal from the custody of the bail, it is considered as a surrender. (*4 Johns. Rep. 407. 6 Term. Rep. 247. 1 Mass. Rep. 283. 2 Johns. Cases, 283, 482.*)

The motion is therefore dismissed, and the judgment below affirmed.

Justices *Nott, Gantt, Richardson* and *Huger*, concurred.

JOHN DUNCAN vs. JOHN BROWN.

Where the defendant had been discharged under the insolvent debtor's act, from confinement, at the suit of the plaintiff, the court *Held*, that that act did not prohibit the plaintiff's suing the defendant, (1) for debts which had been paid by the plaintiff as the defendant's indorser *since his discharge*, but which notes were in existence at the time of such discharge ; and (2dly) for debts due by the defendant to the plaintiff before the arrest and discharge, but which had not been sued on ; nor on which any dividend had been received ; that the law operates a discharge only as to such suits that are pending, or on the debts of those creditors, (whether suing or not) who may think proper to receive a dividend.

Motion to discharge the defendant from Bail.

THIS was a motion to discharge the defendant from bail on the ground that he had been discharged under the

insolvent debtors act in 1819, from confinement, at the suit of the present plaintiff, and therefore was not again liable to be sued by the same plaintiff.

There were two descriptions of debts for which the plaintiff was now suing the defendant.

1st. Debts which had been paid by the plaintiff as the defendant's indorser *since his discharge*, but which notes were in existence at the time of his discharge.

2d. Debts due by the defendant directly to the plaintiff, but not sued for.

Mr. Justice Colcock delivered the opinion of the court.

As to the first description of debts, I entertain no doubt. The defendant is not discharged from such by having taken the benefit of the act; for as to them the plaintiff cannot be said to have been a creditor at the time of the arrest or discharge, and he is not therefore embraced or even contemplated in any part of the act. The case of *Wall vs. The Court of Wardens*, (1 Bay 434,) at first created some doubt in my mind, but a more attentive reading satisfied me that the case could not be considered as embracing the question now before me; and I am of opinion that the plaintiff is not prevented from suing on a note, due before the arrest and discharge, which had not been sued on, or on which no dividend has been received. That the law operates a discharge only as to such suits as are pending, or on the debts of those creditors, (whether suing or not,) who may think proper to receive a dividend.

The act, it is true, as said in the case above referred to, does contemplate three descriptions of persons:

1st. Suitors or suing creditors.

2d. Those coming in and accepting of a dividend of the insolvent debtor's estate and effects; and

3d. Those who had neither chosen to have or accept a dividend.

But the first description of persons may be comprehended in the second and third. Thus a suitor may or may not accept a dividend, and there is nothing in the act to

compel him to do so, even on the demand for which he sues; or a suitor may not be a suitor as to some demands. What is the object of the act? The title shews it to be, to relieve unfortunate debtors from imprisonment. It is not a bankrupt act, except so far as the creditors may choose to make it one. It declares that one imprisoned, may be discharged on certain terms, by giving in a just schedule of all his property, and taking the oath prescribed. It then proceeds to the manner in which the property is to be disposed of, and the manner and extent of the discharge of the insolvent:

1st. It directs that the property shall be assigned by a short endorsement on the petition to the "creditor or creditors, at whose suit he is charged, or to such person as the court shall direct, and that the assignment, to be made as aforesaid, shall be in trust for such suitor or suitors, and such other the creditors of the said petitioner as shall be willing to receive a dividend of his real estate, goods and effects, and shall, within twelve months after the time of exhibiting the petition, make their demand."

This being done, and the petitioner delivering up all his vouchers and title deeds to the assignees, he "shall be forthwith discharged by order of the court aforesaid from such suit or suits, and also, thenceforth, be acquitted and discharged of and from, and against all such other of his or her creditors as shall have received their dividend aforesaid, from all debts, contracts and demands whatsoever."

The first inquiry (in giving construction to this clause) is, to whom is the assignment to be made; to the creditor or creditors? But there is no obligation on them to accept, or on the court to appoint them; for the act says, to them "or such other person." Nothing is to be collected then, from the fact that they may be assignees. Next, for whose benefit is the assignment to be made? For the benefit of those who shall be willing to receive a dividend of his estate, whether suing creditors or not suing creditors; for, according to all the rules of construction, the

words "willing to receive," refer as well to suitor or suitors as to other creditors who may take a dividend. When the act speaks of his discharge, it first simply discharges him from the suit or suits which may be pending. These words are certainly not sufficient to comprehend *all the demands which a suing creditor may have*. Can it be said that a specification of particular debts means all debts?—When the legislature intend to discharge the insolvent from all debts which he owes to any particular description of creditors, it says so in express terms; as in the latter part of this clause, in which he is discharged from the debts of those who take dividends, the words are, "he is acquitted and discharged from all creditors who take a dividend." Of what? Of all debts, contracts, and demands whatsoever. It is then manifest that he is not discharged from any debts not sued for, and the 11th clause of the act confirms this construction; for there, all creditors who do not receive a dividend are allowed to perpetuate their demands in a particular manner. And I would ask, what reason can be given why a person who has sued on one out of twenty debts, should be compelled to take a dividend for the nineteen debts not sued for, any more than one who has a single debt against the insolvent, for which he has not sued. Surely the act did not mean to impose a penalty on one who should sue an insolvent debtor.

The arguments which go to show that the relief afforded by this act is only partial, would be well addressed to the legislature, but can have no effect on the court.

Our duty is to say what they have done, and not what they ought to do; and I am happy to be relieved from that which has been found by all who ever engaged in it, the most difficult subject of legislation.

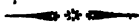
The majority of the court concur in this opinion. The motion is therefore dismissed.

Justices *Nott*, *Huger* and *Richardson*, concurred.

Mr. Justice *Gantt*, dissented.

EOLLESTON vs. MATAULEY, Executor.

On a breach of warranty expressed or implied, in the sale of an article, the damages to be recovered must be rateable with the loss; and if a total loss, the whole sum paid, with interest, may be recovered back. See *Dechs vs. Neel*, (1 Nott & McCord, 210.)



GIVENS, et. ux. vs. PORTEOUS, Adm'r.

Where the plaintiff sued the defendant in debt, on judgment obtained against him as administrator, suggesting a *devastavit*, the original judgment to which the defendant had not pleaded *plene administravit*, and the execution issued on that judgment and returned *nulla bona*, also, the defendant's account as administrator, filed with the ordinary and sworn to, admitting a large balance in his hands due to the estate, exceeding the amount of the judgment, is quite sufficient evidence of a *devastavit*." See (2 Phillips Ev. 296, Tappan vs. Kain, 12 Johns. 120.)

Indeed it has often been held, that "a former judgment against executors, and a *fi. fa.* returned *nulla bona*, are conclusive evidence of a *devastavit*." See *Platt vs. Robins & Swartwout*, (1 Johns. Ca. 276, and a number of cases there referred to: as *Salk*. 310. 1 Lord Raym. 589.) *Erving vs. Peters*, (3 Term Rep. 685.)—R

Where the verdict is for damages beyond the amount laid in the writ, the plaintiff must enter a *remittitur* for the surplus, or a *venire de novo* will be awarded. See *Mooney vs. Welsh*, (1 Const. Rep. 133,) also *Brown vs. Gibson*, (1 Nott & McCord, 326.)



STATE vs. JOSEPH HOLDING.

Where an attorney was convicted of an attempt to suborn a witness to commit perjury, the Constitutional Court ordered him to be stricken from the roll of attorneys.

THIS was a rule served upon *Joseph Holding*, an attorney at law, to shew cause why he should not be stricken from the roll of attorneys. The rule was ordered in October Term, 1820, at *Williamsburgh*, by Mr. Justice *Richardson*, in the following terms:

"Whereas, Mr. *Joseph Holding*, an attorney at law, of the Court of Common Pleas and Sessions of this State, has been convicted of the crime of attempting to suborn a witness to commit perjury; whereupon, by reason of the said

conviction, and of the evidence adduced in support of the indictment for the said crime, against the said *Joseph Holding*, it is ordered, that the said *Joseph Holding* do shew cause at the next session of the Constitutional Court of Appeals, to be holden at *Charleston*, why he, the said *Joseph Holding*, should not be stricken from the roll of attorneys, and be deprived of his commission as attorney at law. It is further ordered that this rule be served upon the said *Joseph Holding*, and the service be certified by the sheriff of this district, and endorsed upon the said rule and transmitted to the said Constitutional Court of Appeals, at *Charleston*."

After the conviction upon the indictment, for an attempt to suborn a witness to commit perjury, the defendant moved this court for a new trial, and in arrest of judgment upon several grounds. But these were unanimously overruled by the court, and the judges were satisfied that the evidence adduced at the trial, fully supported and justified the conviction of the said *Joseph Holding*.

Mr. Justice *Richardson* delivered the opinion of the court.

Two questions are presented by the rule:

1st. Has this court the authority to order the accused to be stricken from the roll of attorneys?

2ndly. Ought the court to make such an order under attending circumstances, and the charge proved by the verdict?

Upon the authority of the court to make such an order, there can be little doubt. "Attorneys, says *Bacon*, (vol. 1, 306,) are officers of the court, and liable to be punished in a summary way, either by attachment, or having their names struck out of the roll of attorneys, for any ill practice attended with fraud and corruption, and committed against the obvious rules of justice and common honesty." (2 *Hawkins*, 217-18-19.) "If an attorney, (says *Tidd*, 60) has been fraudulently admitted, or his misconduct has been gross, or if he has been convicted of felony or other of-

fence which renders him unfit to be continued an attorney, the court will order him to be struck off the roll.”— (1 *Inst.* 101. 2 *Inst.* 215.) The adjudged cases which shew that it is competent for the court to exercise such power, are many. (2 *Black. Rep.* 991. 4 *Burr*, 2060. 8 *Mod.* 109. 4 *Mod.* 367. 4 *Cro. Charles*, 74. 2 *Atk.* 173. 12 *Mod.* 257.) In the modern case, *ex parte, Brownsal*, (*Cowper*, 827,) the defendant having been convicted of felony, and burnt in the hand, was struck off the roll. Lord Mansfield said, we have consulted all the judges, and they are unanimously of opinion that the defendant, having been burnt in the hand, is no objection to his being struck off the roll, and it is on this principle that he is an unfit person to practise as an attorney. It is not by way of punishment; but the court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not. The case of the *King vs. Southerton*, (6 *East*, 143,) and that *Ex parte, Hill & Hargrave*, (2 *W. Black. Rep.* 99,) are similar instances of the exercise of this power in modern times. To these adjudications, and to the authorities of the best compilers, I may add, that the English statutes of 3 *Edw.* 1 c. 29, and 4 *Hen.* 4, which are in affirmation of the common law in this respect, (*See* 4 *Inst.* 101,) and have been made of force in this state, (*P. L.* 28, 38,) and our own acts of the general assembly for regulating the admission of attorneys, (2 *Faust's Collection*, 89,) direct the Judges to be assured of the “character and fitness” of the applicants for admission to the practice of law, which strongly implies that none but men of integrity should be in the profession. The power to strike an attorney off the roll is then unquestionable.

It remains for me to consider the second question, *i. e.* Shall that power be exercised in the present case?

No evidence of a former good character, nor testimonial of reputed integrity has been laid before the court, in order to weaken the unavoidable inference arising from the conviction of a crime, in itself infamous; and we are left

to suspect, that facts would not have warranted an attempt to draw from that source any extenuation of the charge propounded. The charge then remaining without abatement, regard for the character of the attorneys of the court, for the safety of litigants who must apply for justice through such officers, and for purity in the administration of the laws, all require that a member so capable of evil practice, and marked by the conviction of a dangerous and infamous crime, should no longer remain upon the roll.

The rule is therefore made absolute, and it is ordered that the said *Joseph Holding* be stricken off the roll of attorneys, and be rendered incompetent to practise the profession of an attorney at law in the State of South-Carolina.

Justices *Nott, Johnson, Huger, Gantt* and *Colcock*, concurred.



THE STATE vs. URIAH W. CLARKE, *et. al.*

The court *Held* that a writ (of *certiorari*,) which had been allowed, must be considered as legally allowed, until reversed.

And that a Judge may grant further time to issue a writ or make up a proceeding, which had been before ordered, at any time, within a year and a day after the first order, is so usual, and has been so common, that the practice is not to be disturbed at this day.

THIS was a motion made in *October Term*, 1820, before Mr. Justice *Richardson*, to grant further time to issue a writ of *certiorari*, which writ had been before granted to the defendants.

The circumstances as they appeared at the time of making the motion, were the following:

A motion had been made at *May Term*, 1820, for a *certiorari*, on the part of the defendants, to bring before the court at the *October Term* following, the proceedings of a court, held by certain Justices of the Peace, in a case of forcible entry and detainer, returnable at *October Term*; which motion was granted at that time. The defendant's attorney did not issue his *certiorari*; and on the last day

of *October Term*, 1820, moved for further time to issue his *certiorari*, which motion was granted.

The order was as follows :

On motion of *Clarke* and *Singleton*, defendant's attorneys, and it appearing to the court that the defendant's counsel was under a mistake or misapprehension as to the compromise or adjustment of this case, for the furtherance of justice between the parties, *Ordered*, that the rule of this court, granted for a *certiorari*, returnable to *May Term* last, be extended to next term in *October*, 15th July, 1820.

The State appealed on four grounds, viz :

1st. Because a writ of *restitution*, as was alleged, had been awarded by the Justices, and possession given to the owners before the *certiorari* was moved for.

2d. That having neglected to issue the *certiorari*, until return day had passed, the defendants had voluntarily abandoned their case, and should not have been allowed to commence anew, unless by satisfactory affidavits to the court, they could shew that they were prevented from issuing a *certiorari*, by circumstances not within their control.

3d. Because, by the law they are not entitled to a *certiorari* in any event ; the judgment of the court, as to the force and entry, being final and conclusive.

4th. Because the granting of the motion was contrary to law, and the circumstances that were offered against it.

Mr. Justice *Richardson* delivered the opinion of the court.

The leave to issue a writ of *certiorari* had been given in *May Term*, 1820, and no appeal was made from that decision : so that the only question at the time of the motion to allow further time was, not whether the writ should have been originally ordered, but simply whether the court could now grant further time to issue a writ which had been before allowed ; and which, for the purposes of this motion, must be assumed to have been legally allowed, inasmuch as it had never been reversed ?

That a Judge may grant further time to issue a writ, or make up a proceeding which had been before ordered, at any time within a year after the first order, is so usual, and has been so common, that the practice is not to be disturbed at this day.

The motion is therefore refused, unanimously.

Justices *Colcock*, *Johnson*, and *Nott*, concurred.

E. McBRIDE, Ex'ix. of Dr. McBRIDE, deceased, vs.
Captain WATTS.

In an action by the executrix of a deceased physician, against the captain of a ship, for medicine and attendance on the mate of the ship, the physician's book of original entries proved in the usual way, and the testimony of a witness who said he presented the bill to the captain, who made no objections to it, but who could not say positively that he said he would pay it, but the impression on his mind was, that he intended to pay, was *Held* by the court sufficient evidence to make the captain liable; and that it was not a case within the Statute of Frauds.

It seems, also, that a master of a ship, by the ancient marine law, when a seaman is sick or disabled, is bound to provide every thing necessary for his recovery, and has a right to deduct the amount out of his wages.

Charleston Court of Appeals, May Term, 1821. Motion for a new trial.

THIS was a summary process for the amount of a doctor's bill for medicine and attendance, on the mate of captain *Watts'* ship, while he was ill of a fever in Charleston. In support of this bill, Dr. *McBride's* original book of entries was produced and proved in the usual manner. In addition to which, a witness, Mr. *Barker*, proved that he had tendered this bill to captain *Watts*, who made no objection to it; but he could not say positively that he said he would pay it, but the impression on his mind was, that he intended to pay it.

To this it was objected on the part of the defendant, that this was a case which came under the Statute of Frauds,

being for medicine and services rendered to a third person; and therefore to make captain *Watts* liable, there should have been some memorandum in writing, promising to pay this debt, before captain *Watts* could be chargeable.

To this objection, it was replied that physicians books of entries were evidence both as to the person chargeable, and the services, &c. rendered, in the same manner as shop keepers books; and this it was urged was corroborated and confirmed by the testimony of the witness who tendered the account, as he did not object to it, when the account was tendered to him. If the defendant had not considered himself as liable, or if he had not employed Dr. *McBride* to attend his mate, that was the time for him to have denied it. Instead of which, the witness said the impression of his mind was, that he would pay it; but most certainly, that he made no objection to it.

Mr. Justice *Bay* delivered the opinion of the court.

After hearing counsel on both sides, I was of opinion, and so decreed, that the doctor's book of original entries was good evidence, both as to the medicine administered, and of the person at whose instance the services were rendered, upon the authority of the case of *Foster vs. Sinkler*, (1 *Bay* 38) where it was determined, that a shop keeper's book was *prima facie* evidence, both of the sale and delivery. And so in the case of *Maddox ads. Pitman*, (*Salk.* 690) which was assumpsit for a taylor's bill; proof of the hand-writing of the servant who made the entries, he being dead, was held sufficient, and *Lord Holt* held it good, though no proof of the delivery was made. So in the present instance; I thought that the entries made by Dr. *McBride* were good proof that *Capt. Watts* had employed him, and therefore that this case did not come under the Statute of Frauds. But I was further confirmed in this opinion by the testimony of the witness, who proved that when the account was tendered to the defendant, he made no objection to it, which was a tacit admission that he had employed the doctor.

There was still another ground in the case, which I thought a good one, to-wit: that a master of a ship, by the ancient marine law, where a seaman is sick or disabled, is bound to provide every thing necessary for his recovery, and has a right to deduct the amount out of his wages.— (1 *Moll.* 351, *Laws of Oleron*, ch. 6.)

From this decree, there has been an appeal to this court, where the case has been again argued; where the arguments which had been taken in the court below were again urged. But I can see no ground for altering the opinion then given in the case, and therefore think the rule, for the new trial, should be discharged.

Justices *Colcock*, *Nott* and *Gantt*, concurred.



CHARLOTTE M. HEYWARD vs. Gen'l. JOHN A. CUTHBERT, Ex'or. of WM. HEYWARD, dec'd.

No damages are allowed on a Judgment in Dower.

THIS was a petition by Mrs. *Heyward*, for her dower in certain lands lying in the district of *Beaufort*, whereof her late husband, *William Heyward*, had died seized.

The defendant pleaded in bar a former recovery of ten thousand dollars, in full for her dower; on which issue was joined.

That issue was tried, and a verdict found for the demandant.

At a subsequent time a motion was made to submit the cause again to the jury, to assess the damages which she had sustained by the detention of her dower. That motion was resisted on the ground, as was contended, that a demandant in dower was not entitled to damages. The objection was sustained by the court, and this was a motion to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the court.

The only question in this case is, whether a widow is

entitled to damages in an action for dower. Lord *Coke* says, that by the Statute of *magna charta*, chap. 7th, she shall tarry in the chief house of the husband, but by the space of forty days after the death of her husband ; within which time, dower shall be assigned unto her : but of little value, says the same author, was that act, for no penalty was thereby provided, if it was not done. (*Co. Lit. Lib. 1. c. 5, sec. 39.*) In note 4, same page, it is observed, that before the statute of *Merton*, there were no damages in dower. And again, in the text ; “ but for the relief of the widow, it was provided by the Statute of *Merton*, made Anno, 20, H. 3, c. 1, which, by *Bracton* is called *nova constitutio*, the wife shall recover damages in her writ of dower.” The same doctrine is laid down in 2 *Saunders*, 45, *William, the heir of William vs. Gwyn*. In *Comyn*, it is said the judgment in dower shall be, that the demandant shall recover one third part of the tenements, &c. ; and then came the Statute of *Merton*, which provides, that if she shall have recovered the tenements of which her husband died seized, the tenant shall render damages. (*5 Com. 673.*) So it appears that until the Statute of *Merton*, no damages were recoverable in dower. Indeed, if they were recoverable before, the Statute was unnecessary. It is admitted that we have no act of the legislature allowing damages. It only remains then to inquire whether the Statute of *Merton* is of force in this state ? There is some difficulty in ascertaining, with certainty, which of the English Statutes are, and which are not of force with us. But I think the difficulty is not great. Two learned Judges have digested the laws of the State, and we generally reject all the Statutes which are not found in one of those compilations. It is true that some of the English Statutes have been adopted in practice, which do not appear to have been made of force by any act of the legislature ; and if it had been the usual practice in this state to allow damages in dower, I should have considered it as sufficient evidence that the provisions of the Statute of *Merton* had been adopted here, and had now become the common law of this

state. But the practice has been the reverse. I cannot learn, from the oldest lawyer in the state, that damages have ever been allowed; and I think it would be too bold an innovation to introduce the practice at this late day.— There may be cases where it would seem reasonable that a wife should recover damages for the detention of her dower. But there are few in which they ought to be considerable; because she may have her writ at any time, and the delay is not usually great. And there would be some difficulty in carrying such a law into effect in this state, where the proceedings are many times carried on against the executor or party in possession, and not against the heir. But it is sufficient for the court that there is no law to authorize it.

The motion must therefore be refused.

Justices *Colcock*, *Huger* and *Richardson*, concurred.

Mr. Justice *Gantt*, dissented.



BANK OF SOUTH-CAROLINA vs. HUMPHREYS & MATHEWS.

One partner, after dissolution, cannot bind the other by drawing a note in the co-partnership name, unless he has a particular power vested in him for that purpose.

Nor can one of a firm, which is dissolved, renew a note in the bank, in the co-partnership name; although, during the co-partnership, the firm had written a letter to the President and Directors, requesting to be permitted to renew their note, until the expiration of a certain time, during which time this renewal was given, but subsequent to the dissolution. It was *Held* not a power given to affix the name to a note of the partnership after dissolution.

Notice of a dissolution of co-partnership, published in a Gazette, which was taken by the bank, was *Held* a sufficient notice to the bank; though the defendant had had dealings with the bank.

Tried before the City Court, January Term, 1821. Assumpsit upon a promissory note for \$340.

THE question in this case was, whether the note declared upon was such as under the circumstances would bind

the partnership? The note was admitted to have been signed by *Humphreys*, one of the partners. It was subscribed "*Benjamin Mathews and self, by R. W. Humphreys,*" and dated on the 26th of *April*, 1820. The dissolution of the partnership was published in the *Courier* and the *City Gazette*, on the — day of *March*, 1820.

The plaintiff's counsel produced a letter directed to the President and Directors of the *South-Carolina Bank*, dated on the 3d June, 1819; subscribed "*Humphreys & Mathews.*" This letter contained the following paragraph. "We only require that you will permit us to renew our notes in full for nine months, and pay the interest only, and offering the same endorsers who now are on our paper, and at the expiration of that time, we engage to take at least 10 per cent. and as much more as possible. Should we be able to commence paying the above ten per cent. before the expiration of the time specified, we will do so."

Mr. *Stoll*, (a clerk in the bank,) on the part of the plaintiff, proved, that in June, 1819, the original note, on a renewal of which this action was brought, was due by the defendants to the bank; that the original amount of it was \$425; that it was renewed in full in July, September and November, 1819; and that in Jan. 1820, it was also renewed in full. In March, it was reduced to \$380, in April to \$340; and that the same endorsers continued upon the note during all this time. The witness said he saw the advertisement of the dissolution of the partnership in the *Courier* and *City Gazette*, and that these papers were taken by the bank.

Captain *Jervay*, for the defendant, stated, that during the existence of the firm he had taken receipts from them, which were always signed "*Humphreys & Mathews.*"

He never saw any of their notes.

The defendants contended that this note was only obligatory upon Mr. *Humphreys*, the signer of it; as it was given after the dissolution of the partnership, when Mr. *Humphreys* had no authority to bind the firm; that the unusual manner in which the note was drawn, sufficiently

shewed that it had been executed after the dissolution of the partnership, independently of which, a notice to that effect had been published in the *Gazettes* of the city.

The plaintiff's counsel argued, that the letter produced by him, amounted to a precedent authority in *Humphreys* to draw this note; that during the existence of the partnership, the letter of the 3d of June had been written, by which the members of it were bound, as the conditions contained in the letter had been acquiesced in by the bank. That the manner of subscribing the note was not illegal, nor did it manifest that the partnership was dissolved; and that the bank had never had any legal notice of the dissolution; because, where there had been previous dealings between the parties, a mere publication in the *Gazette* was not sufficient.

The Recorder stated to the jury, that after the dissolution of a partnership, the general rule was, that one partner could not bind another by signing the partnership name to a note, and that to render a note so signed obligatory, an authority must be vested in the subscribing partner. He did not think the letter produced by the plaintiff was sufficient. It was to be considered in the same light as any other contract entered into during the existence of the partnership; which would be binding according to its nature, and for a breach of which, an action might be supported for damages, if any had been sustained; but that a contract of this description was very different from a power giving an authority to affix the name of a partnership to a note drawn subsequently to the dissolution of the firm. He thought also, that notice of the dissolution of the partnership was sufficiently established, as it had been proved that the *Gazettes* in which the advertisement had been published, were taken by the plaintiff, which he regarded as tantamount to express notice.

The jury found a verdict for the defendants; and notice was given that a new trial would be moved for, upon the inclosed grounds.

Mr. Justice *Colcock* delivered the opinion of the court.

It would be superfluous to add any thing to the observations of the Recorder. The court unanimously concur in the view which he has taken of both the law and facts.

The motion is therefore dismissed.

Justices *Richardson*, *Huger* and *Gantt*, concurred.



DAVID DEAS *ads.* Executrix and Executors MARIGAULT, Assignee W. A. DEAS. Same *ads.* Mrs. MARIGAULT, and others.

On a plea of *non est factum* to a bond, under the act of 1802, any competent witness may prove the hand-writing of the obligor in the place of the subscribing witness, unless the plea of the defendant be verified by his oath.

Tried at Charleston, January Term, 1821, before Judge *Richardson*. Debt on Bond.

NEW trials in these cases were moved for before the Constitutional Court in Charleston, on the following grounds :

1st. Because the plaintiffs were permitted to prove the execution and delivery of the bonds, by only proving the hand-writing of the defendant ; although the witness to the bond was in Charleston or its vicinity, and was known to the plaintiffs and their attorney ; and the plaintiffs did not prove the hand-writing of the witness.

2d. Because the plaintiffs did not produce the witness to the assignment of the bonds nor his testimony ; and thus did not produce the best evidence in their power.

3d. Because the verdict was contrary to law and evidence.

Mr. Justice *Richardson* delivered the opinion of the court.

In each of these cases, the plea was *non est factum*, and in each case, the hand-writing of the obligor, and that of the assignor also, was proved without opposition ; though

not by the subscribing witness. This substitution of one witness for another is, in conformity to the act of 1802, which, according to an early adjudication, and the uniform practice since, permits any competent witness, who can, to prove the hand-writing of an obligor in the place of the subscribing witness, unless the plea of the defendant be verified by his oath.

The motion is therefore dismissed in both cases.

Justices *Colcock*, *Natt*, and *Gantt*, concurred.

Simons and *Waring*, for the motion.

Charles Fraser, contra.

DANIEL M'NEIL vs. JOHN PHILIP.

In an action of trover, where the defendant received a negro slave of the plaintiff, upon a promise to return him, on a certain event, which had occurred, the court *held*, that it was not necessary to inquire into the strict legal title of the plaintiff.

Tried before Judge *Richardson*, in Charleston, January Term, 1821.

THIS was an action of trover, for a negro named *Ellick*. Mr. *Sinclair*, a witness for the plaintiff, proved, that in July, 1817, he called with the plaintiff on the defendant, and heard the defendant acknowledge that he had received said negro from the plaintiff, under a promise to return him to the plaintiff, when the business of a certain prize was settled, but thought himself as much entitled to the negro as the plaintiff.

It was admitted by the defendant that the business of the prize alluded to, was settled when said conversation took place.

The plaintiff called a witness, Capt. *Turner*, who proved that in a conversation with the defendant, about twelve or fifteen months before, the latter informed him that he had sold *Ellick* to a back countryman. This witness also testified that he had seen *Ellick* in the defendant's posses-

sion, between two and three years previous to this period ; that he was employed by the defendant on board a coasting vessel, plying between Charleston and Beaufort ; that *Ellick* was an African, and worth \$ 500.

Here the plaintiff's case closed ; and the defendant called a Mr. *Humphries*, who testified that he was the second officer of the Revenue Cutter, commanded by the plaintiff, when the prize alluded to, viz. the *General Blake*, was taken, hovering on the coast with negroes on board, viz : four Africans, of whom *Ellick* was one. That they were all brought into Charleston by the Cutter. He further testified that he knew the defendant had possession of *Ellick*, but could not fix the time when ; that he had seen the negro about three years before the period of the trial, who was then working out for captain *Philip*, the defendant, in a coasting vessel, and was hired to captain *Mead*. Witness supposed he was not worth more than \$ 300, as he sometimes got drunk. He further said, the usual wages of a negro coaster were from 8 to 10 dollars per month.

It was admitted at the trial that the prize had been condemned under the act of Congress, for hovering on the coast with negroes on board ; but that the said negroes were not condemned, nor would the court make any order concerning them, but they remained with the plaintiff except *Ellick*, who was loaned as aforesaid to the defendant.

Here the case closed ; and the defendant contended that he was either the owner of the said negro, by occupancy, or a joint owner with the plaintiff, under the act of Congress, and therefore he was not liable to this action ; and that the sale of the negro, and the receipt of his price were not tantamount to a destruction of the thing, as it was only a change from a negro into money.

The plaintiff, on the other hand contended, that his title could not be disputed by the defendant, who had received the negro from him, under the express promise to return him, as was proved. He denied that the defendant was a joint owner with him under the act of Congress, or a sole owner by occupancy. But even if he were regarded as a

joint owner, he was still liable to this suit; as he had sold the negro, which *quoad* the plaintiff's right was tantamount to a destruction of the thing; for it was carried away, no one knew whither. That consequently he, the plaintiff, was entitled to a verdict for the value of the negro as proved, and eight or ten dollars per month damages for wages from the time of the demand, viz. July.

The Judge charged that the defendant could not dispute the right of the plaintiff to the negro, as he had received the said negro from the plaintiff under a promise to return him. The jury, however, found for the defendant.

A motion was therefore made for a new trial, on the following grounds:

1st. Because whether the plaintiff was or was not the owner of said negro, he was entitled to recover against the defendant, who, having received him from the plaintiff under a contract to return him, was estopped in law from controverting the plaintiff's title.

2d. Because the plaintiff was in fact the owner of the said negro by the right of occupancy, and the possession of the defendant as his baillee or agent, was the possession of the plaintiff.

3d. Because if the plaintiff was not the absolute owner, he had a special property in said negro under the act of Congress, in which the defendant had no share; and consequently could maintain his action against any one but the true owner.

4th. Because even if the defendant were a joint tenant with the plaintiff, which is denied, yet the action could be supported, as the defendant had destroyed the property.

5th. Because the verdict was contrary to law and evidence, and the charge of the presiding Judge.

Mr. Justice *Richardson* delivered the opinion of the court.

It is not necessary to inquire into the strict legal title of the plaintiff to the negro slave, under the authority of the case of *Norwood vs. Manning*, decided in the Constitu-

tional Court at Columbia in 1817. It is enough to say that the defendant had stipulated to return *Ellick* to the plaintiff upon a certain event which had occurred; and good faith required this contract should be fulfilled on the part of the defendant.

A new trial was therefore granted.

Justices *Colcock*, *Nott*, *Huger*, and *Gantt*, concurred.

Prioleau, for the motion.

Gadsden, contra.

LEVY and ROBERTS.

The defendant, paying money over to the sheriff, on an execution, cannot be considered as paying it voluntarily; and if improperly paid, the sheriff, upon a rule may be ordered to pay it back.

Where the plaintiff's demand has been reduced by actual payments, to a sum within the *Summary Process* jurisdiction, he must proceed by way of *Summary Process* for the balance; and if he bring his action for the whole, he can recover only the costs of a *Summary Process*. But it is otherwise where there are mutual demands, and the plaintiff's debt is reduced by discount; because he may not know the amount of the defendant's demand; neither can he know that he will avail himself of such defence.

CHARLES C. MEASE vs. ANN WAGNER.

Where no action will lie against the person undertaken for, it is an original undertaking, and not within the Statute of Frauds.

Where the wife whose husband died and left his estate to her for life, remainder to his nephew, died leaving a *separate estate of her own*, the court *Held* that the estate of her husband was not liable for her funeral expenses; but that *her own estate* was bound for them.

THIS was an action for the articles furnished the funeral of Mrs. *Bradley*, at the request and by order of the defendant. Mrs. *Bradley* was the widow of Dr. *Bradley*, who left her his estate during life, remainder to his nephew *John Bradley*. Mrs. *Bradley*, prior to her death, expressed a wish to be buried in a particular manner. As

soon as she expired, the defendant was sent for as a friend of the family, and she undertook to procure the articles necessary to such a funeral as the deceased had desired. She proceeded to the shop of the plaintiff, where she selected the articles required, saying they were for Mrs. Bradley's funeral. She was asked "by whom they were to be paid for." She replied, "charge them to the estate of Dr. Bradley, and as soon as his nephew comes to town he will pay for them, or I will." The articles furnished were such as were suitable to the condition in which Mrs. Bradley had lived.

On the arrival of the nephew in the city, the account was presented to him, and he refused to pay it, saying that the defendant had no authority to procure the articles at his expense. The defendant was then applied to, and she refused payment. Some time after this refusal, one of the witnesses remonstrated with the nephew on the impropriety of his conduct, when he said he would pay it, but did not. It appeared that a Miss Teabout administered upon the estate of Mrs. Bradley.

The council for the defendant contended that she was not responsible, as it was a collateral and not an original undertaking.

The court charged the jury that it was an original, and not a collateral undertaking, and that the defendant was liable.

A verdict was accordingly rendered for the plaintiff. A motion was now made for a new trial, on the ground, that the court misdirected the jury.

Mr. Justice ~~Huger~~ delivered the opinion of the court.

It has been regarded as settled doctrine ever since the case of *Buckngr vs. Darnall*, (2 Lord Raymond, 1085. *Robt. on Frauds*, 218,) that when no action will lie against the party undertaken for, it is an original promise. If A. promise B. that in consideration of his doing a particular act, C. shall pay him such a sum, and if C. do not pay him, he, A. will pay the same; this is said to be no

collateral undertaking on the part of A. unless C. was privy to the contract, and recognized himself as a debtor also. (*Fitzgibbon*, 302. *Robt. on Frauds*, 223.) In the case before me, the defendant undertook for the representative of Dr. *Bradley*, against whom no action could lie for the articles furnished for the funeral of Mrs. *Bradley*. And there was no privity of contract between the plaintiff and the nephew of Dr. *Bradley*. But it has been urged, that the subsequent promise of the nephew had a retro-active operation, and rendered him liable; but if he were not liable before the promise was made, he could not be so afterwards. It was not in writing, and was *nudum pactum*. Had the defendant undertaken for the estate or legal representative of Mrs. *Bradley*, who was legally bound to pay the expenses of her funeral, it would have been a different question: but she unfortunately undertook for one who was not responsible, and who was so far from being privy to the contract, or acknowledging himself a debtor, refused payment and denied the authority of the defendant to render him responsible.

I am of opinion therefore that the motion must be refused.

Justices *Nott*, *Johnson*, *Richardson* and *Colcock*, concurred.

Mr. Justice *Gantt* dissented.

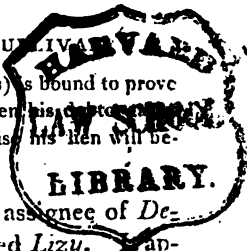
King, for the motion.

Hunt, contra.

JOHN PORTEUS, Assignee, vs. T. SULLIVAN.

A creditor secured by mortgage (as other creditors) is bound to prove by oath his debt to be *bona fide*, at the time when his debt was contracted, to the benefit of the insolvent debtor's act; otherwise his lien will become forfeited.

THIS was an action of trover by the assignee of *Deveaux* vs. *Sullivan*, for a negro woman called *Lizy*. It appeared that *Lizy* had been the property of *Deveaux*, and



that he mortgaged her to *McClure* to secure the payment of a debt. Some time after, *Deveaux* became insolvent, and took the benefit of the insolvent debtor's act. The woman *Lizy* was returned, with other property on his schedule. *McClure* had her taken, and put into *Sullivan's* hands to sell under the mortgage. The assignee, in consequence of *McClure* not proving his demand, or exhibiting his mortgage at the time *Deveaux* took the benefit of the act, thought his lien forfeited, and brought this action to recover her.

The Judge on the circuit, charged the jury to find a verdict for the plaintiff, as a creditor secured by mortgage was as much bound by the act to prove his debt as any other creditor.

A verdict was accordingly found for the plaintiff.

A motion was now made for a new trial, on the ground that the Judge erred in his charge.

Mr. Justice *Huger* delivered the opinion of the court.

The insolvent debtor's act provides not only for the debtor, but the *bona fide* creditor. If it liberates the one from imprisonment, it secures to the other the property of the debtor. To effect the last, it requires of the debtor a return on oath of all his property; and of the creditor, secured by assignment, mortgage or conveyance, in trust of any property, a statement on oath of the monies *bona fide* due. (*Grimke P. L.* 249.) The object of this requisition is, to defeat fraudulent assignments, mortgages and conveyances, in trust. The 4th clause of the act goes on to declare, that if the estate so conveyed shall be more than sufficient to satisfy the debt *bona fide* due, the court is required to order the trustees or either of them, (and the assignees are declared to be trustees in the preceding clause,) to sell such estate within twelve months thereafter; and the monies arising from such sale, shall be first applied to the discharge of the sum due to the assignee, mortgagee or other person or persons, to whom such conveyance was made, and the residue shall be applied in like manner as

the other part of the debtor's estate. The 7th clause of the act declares, that the assignee, mortgagee, or such person to whom any conveyance shall have been made as aforesaid, that is to secure the payment of a debt, shall not appear before the court at the time appointed for the appearance of the creditors, and shall make oath of the *bona fide* debt due such assignment, mortgage or conveyance in trust, shall be deemed fraudulent. In this case, the creditor, secured by mortgage, not having proved his debt in the manner prescribed by the act, has lost his lien.

The motion must therefore be discharged.

Justices *Nott, Johnson, Gantt* and *Colcock*, concurred.

EX-PARTE, CITY SHERIFF.

When a mortgage for certain lots was duly recorded, subsequent to which several suits were commenced against the same mortgagor, and judgments were obtained, and executions lodged, and the lots in question were levied on and sold, and at the sale the mortgagee purchased them, the question was whether the mortgagee or the other creditors were entitled to the money? And the court *Held* that the judgments were first entitled to be satisfied.

THIS was a rule on the sheriff, to shew cause why he did not pay to the mortgagee of certain lots of land in the city of Charleston, money which had been made by the sale of the said lots under judgments obtained by the other creditors of the mortgagee.

It appeared that the lots in question were the property of *J. A. Schrooder*, who had mortgaged them to *Sass*, to secure the payment of a bond. The mortgage had been duly recorded. Subsequent to the recording of the mortgage, several suits were commenced against *Schrooder* by his creditors. Judgments were obtained and executions lodged. The lots in question were levied upon and sold, and at the sale, the mortgagee purchased the lots. The question was whether the mortgagee or the other creditors were entitled to the money?

The Recorder being of opinion that the mortgagee was

first entitled to satisfaction, the rule was made absolute.

A motion was now submitted to reverse the order of the Recorder.

Mr. Justice *Huger* delivered the opinion of the court.

At common law, on the non-payment of the money at the time limited, the mortgagee's estate becomes absolute. But by the act of 1791, his situation is altered. The mortgagor is declared to be the owner of the land, even after the time for the payment of the money has elapsed; and the land mortgaged is considered only as a pledge to secure the payment of the money due. This act prevents the mortgagee from proceeding against the land by ejectment, which could be done at common law; but the mortgagee is still at liberty to bring an action of debt on his bond, and to proceed against the property of the mortgagor generally; or he may apply to the Court of Common Pleas, after judgment, for an order to sell the mortgaged land, provided any judgment has been obtained against the mortgagor subsequent to the date of the mortgage, and prior to the judgment by the mortgagee. Should another judgment creditor proceed to sell the property mortgaged to satisfy his own demand, he could only sell what really belonged to the defendant; that is, the land subject to the lien of the mortgage: and the purchaser having notice of the mortgage, (and recording is notice,) could only purchase subject to the mortgage; in other words, all that the mortgagor possesses, and therefore all that could be sold, is the equity of redemption. Nor is the case altered as it respects the quantity of interest sold, by the mortgagee becoming the purchaser. He could only purchase what could be legally sold, the equity of redemption. But having purchased the equity of redemption, the whole estate becomes united in him.

In the case of *Jackson vs. Hull*, (10 *Johnson*, 481,) the mortgagee sold under his own judgment, and received the proceeds. He then brought an action of ejectment against the purchaser, and recovered, and the judgment

was sustained on the ground that only the equity of redemption had been sold under the first judgment, and the mortgagee was still entitled to the estate, subject only to the equity of redemption.

The act of 1791 has affected in some degree the parties to a mortgage; but when construed in conjunction with the act of 1797, which declared that a release of the equity of redemption to the mortgagee shall have the same effect as if the act of 1791 had not been passed, it appears that no other change has been produced but to prevent the mortgagee from bringing an action of ejectment.

In the case of the *Executors of Ashe vs. Executor of Livingston*, (2 Bay, 80,) the Court is supposed to have established a different rule. But this is a mistake. In that case, the contest was between a judgment creditor and a prior mortgagee for the assets of the estate of *Berwick*. There is no question that a mortgagee may forego his mortgage, and proceed against the estate generally; and there is as little question that under the executor's act of this State, a prior mortgage is preferred to a subsequent judgment. At the death of *Berwick*, the mortgage of *Ashe*, though misplaced, was in existence, and though not recorded, was binding. And the mortgage of *Ashe* ought to have been satisfied before the judgment of *Livingston* was paid, which from having been obtained subsequent to *Berwick's* death, must have been junior to *Ashe's* mortgage. The *Executors of Ashe*, whose prior claim had been thus unintentionally neglected, thought proper to follow the money into the hands of the *Executor of Livingston*, to whom it had been improperly paid, rather than proceed against the land which was in the hands of a *bona fide* purchaser. The court then only decided that a prior mortgage was preferred under the executor's act to a junior judgment; and that an action of assumpsit would lie.

But independent of the executor's act, the case of *Livingston vs. Ashe*, is very distinguishable from the one in question. The mortgage was executed by *Berwick* many years prior to 1791; and on the failure of *Berwick* to pay

the money, the estate had become absolute in *Ashe*. It was then his estate that was sold and not *Berwick's*. The sheriff, it is true, sold it as *Berwick's*, but it was evidently a mistake arising from an ignorance of *Ashe's* mortgage. This mistake or error was not conclusive on *Ashe*; and this representative might have brought his action of ejectment, and must have recovered. But it was perfectly in his power to acquiesce in the sale, and to pursue the purchase money, which he did, and was supported in so doing by the court.

Nor does the case of *Ex-Parte Stagg*, (1 *Nott & Me Cord*, 405,) decided in January Term, 1819, interfere with the view I have taken of this case. In that case, the only question made, was as to the priority of the liens.— And the court decided that a mortgage recorded before a judgment was confessed, though both were done on the same day, was to be preferred. Although it does not appear from the statement of that case, I am informed by the Judge who delivered the opinion of the court, that it was understood that both parties had agreed that the whole interest in the land should be sold by the sheriff, and that the money made should be paid as the court should decide. The fact was, that the property was not sufficient to satisfy the mortgagee, and therefore the equity of redemption was of no value. If the judgment creditor could not come in with the mortgagee, he could get nothing.

I am of opinion therefore that the order of the City Court ought to be reversed.

Justices *Gantt* and *Johnson*, concurred.

Mr. Justice *Nott* :

I concur in this case, on the ground that the mortgagee was a mere stranger, and could not be known to the court.

Mr. Justice *Richardson* :

I dissent, upon the authority of the case of the *Executors of Ashe vs. Executor of Livingston*.

JAMES B. RICHARDSON vs. GEORGE WHITFIELD.

No proceedings are necessary to be had against the garnishee who makes no return to the attachment, until judgment is recovered against the absent debtor; and then upon motion, *il seeme*, even without notice, judgment may be entered up against the garnishee; therefore, a garnishee who has made no return, and against whom no proceedings have been had for four years, but during which time the judgment had not yet been recovered against the absent debtor, can not be examined as a witness on the part of such absent debtor, on the trial of the case in which he had been garnisheed.

It seems that the act of the legislature making a copy writ, left at the residence of the defendant equivalent to personal service, does not include writs of attachment.

Attachment.

THIS was an action to recover the value of a negro, purchased of the defendant. It appeared that the negro was sold for a full price, and there was some evidence of his having been unsound at the time of sale. As the defendant was absent from the state, a writ of attachment was served upon Col. *Howard*, who had in his possession property of the defendant. Col. *Howard* made no return to the writ; but against him there had been no proceedings from the service of the attachment to the day of trial, a period of four years. Under these circumstances, he was offered as a witness on the part of the defendant; and was objected to by the plaintiff's counsel, on the ground, that as garnishee, who had made no return, he was liable for the amount that might be recovered in the action.

The defendant's counsel, on the contrary contended, that as there had been no judgment by default entered up, as is the practice in such cases, nor other proceeding had for four years, the plaintiff was to be regarded as having abandoned his claim upon the garnishee, and that he was in fact out of court.

The Court overruled the objection, and the witness was sworn, and testified strongly to the soundness of the negro at the time of the sale.

A verdict was had for the defendant.

A motion was made for a new trial on the ground

that the court erred in admitting the evidence of the garnishee.

Mr. Justice *Huger* delivered the opinion of the court.

At the trial I was unacquainted with a decision of the Constitutional Court, made at *Columbia* some years since, and which my Senior Brothers tell me fixed the practice in such cases. The decision has not been reported, neither is the title recollected, but the garnishee was a Mr. *Silliman*. In the case alluded to, it was determined, that no proceedings were necessary to be had against the garnishee who makes no return to the attachment until judgment was had against the absent debtor. And then upon motion, even without notice, judgment is entered up against the garnishee. As the court decided in the case of *Wm. Alston*, garnishee of *Pinckney*, not reported as I know of, that the act of the legislature making a copy writ, left at the residence of the defendant, equivalent to personal service, did not include writs of attachment, I apprehend that no inconvenience will result from dispensing with notice.

A new trial is ordered.

Justices *Bay*, *Nott*, *Gantt* and *Johnson*, concurred.

THE STATE vs. JOHN DUNCAN.

A thoroughfare, or way, leading from one highway to another, is a highway, the stopping of which is a nuisance, for which an indictment will lie.

Indictment for a nuisance in stopping a public highway.

THIS was an indictment against *John Duncan*, for a nuisance in obstructing a navigable creek, by erecting flood gates across its mouth, and in maintaining these flood gates.

A number of witnesses were called on the part of the prosecution, who proved that they had always considered

this a public creek, and they believed it to be generally so reputed; that it had been always open, until the dam owned by the defendant was built, and that boats, wood-schooners, &c. had used the creek. That it was dry at low water, and that the mouth of the creek was about two feet above the water in the river at low tide. The creek runs from *Ashley* river through the marsh on the west side of *Charleston*, and, it appeared from the evidence of one witness, that *Lynche's street* runs down to this creek, at the extremity of which, on *Cumming's creek*, there is a landing.

On the part of the defendant, several witnesses proved that they never had heard of this being a public navigable creek; that they never had considered it such; and though they had every opportunity of becoming acquainted with the fact, had it existed, they never knew that it had the reputation of being a public creek. The copy of a plat and grant, by the Lords proprietors, to *John Cumming*, of a tract of 133 acres of land lying between *Cooper* and *Ashley* rivers was produced. The plat of land northerly and southerly was bounded by streight lines running from river to river.

It was contended on the part of the *State*, that *Cumming's creek*, (the creek in dispute,) formed a part of the southern boundary; and the defendant insisted that the south line crossed the creek and went to the river. There were further given in evidence for the defendant, the acts of the legislature, vesting, as he contended, the whole creek in the city of *Charleston*; an early plat of *Charleston*; a plat of *Charleston* of 1770; one of the city lands by *Purcell*, surveyor, in 1797, including the creek; several other plats illustrative of the subject, and intended to shew that the creek had always been considered within the city lands, and a regular chain of titles from the City to the defendant, giving an express authority to erect the flood gate complained of as a nuisance.

The jury found the defendant guilty; and he moved for a new trial on the ground, that the evidence did not

support the allegation contained in the indictment, that the defendant had stopped a public highway.

Mr. Justice *Huger* delivered the opinion of the court.

The difficulty in this case is, to ascertain the character of *Cumming's* creek. It appears to have been used for many years as a way by which the people living on *Harleston's* green approached their dwellings from *Ashley* river; but this alone would not constitute a highway; for a way leading from a highway, and terminating at a private house or in a particular neighbourhood is not a public, but a private way, for the stopping of which an indictment will not lie, (1 *Hawkins*, 367;) but a thoroughfare or way leading from one highway to another, is a highway, the stopping of which is a nuisance, for which an indictment will lie. (5 *Taunton*, 125.) There is no doubt that *Ashley* river is a highway, and as little that *Lynche's* street is one. If therefore *Cumming's* creek be a thoroughfare between *Ashley* river and *Lynche's* street, or any other street equally a highway, a stoppage of it is a nuisance, for which the proper remedy is indictment. The witnesses however appear not to have distinguished between a public and private way, and only one, and he incidentally mentioned that there was a public landing place at the extremity of *Lynche's* street on *Cumming's* creek. If this fact had been fully proved, or had it been distinctly submitted to the jury, and they had thought proper to find the verdict they did, I should have been unwilling to disturb it; but as there is some doubt whether the jury ever regarded the existence of this fact as important in the case, and as no injury can result from another trial, and much consideration is due to the public interests involved, I am of opinion that the motion for a new trial ought to be granted.

Justices *Nott*, *Bay* and *Johnson*, concurred.

ANTHONY RODERICKS vs. WILLIAM R. PAYNE.

A plaintiff in *replevin*, is bound to file his declaration, and post his rule to plead within a year and day, as other plaintiffs.

IN this case, a writ of *Replevin* was issued on the 14th April, 1819; and on the 13th May following, the declaration was filed. No further proceedings were had until the 25th July, 1820, when a rule to plead was posted. The defendant did not plead, and on the 2d of September following, the plaintiff obtained an order for judgment. The case was then put on the writ of inquiry docket, and when called, a motion was made by the defendant to set aside the judgment, on the ground that more than a day and a year had intervened between the filing of the declaration and posting the rule to plead.

This motion was sustained by the Circuit Court, and a motion was submitted to reverse the order of the Circuit Court, and to reinstate the case on the docket.

Mr. Justice *Huger* delivered the opinion of the court.

It is not pretended that the plaintiff is not bound to post his rule to plead within the day and year from the filing of his declaration; but it is contended that a plaintiff in *replevin* so called, is in fact defendant, and therefore not bound by those rules which apply to plaintiffs generally. However different in some respects the plaintiff in *replevin* may be from plaintiffs generally, he must be governed by the same rules, when similarly situated. In filing his declaration and posting his rule to plead, there is no difference between them, and the same rules which govern in one case, extend to all. If the plaintiff in *replevin* were not bound to post his rule, neither would he be bound to declare, and if not bound to declare within a fixed period, it is difficult to imagine how and when the suit would terminate.

The motion is refused.

SAME vs. SAME.

A defendant who has not entered an appearance, nor filed a plea, cannot move to enter up judgment of *non pros*.

AS soon as the order for judgment was set aside in this case, the defendant's counsel moved for leave to enter up judgment of *non pros*, which was refused.

A motion was submitted to reverse that order.— But there was nothing to support a judgment. The defendant had entered no appearance, neither had he filed a plea. This motion must also be dismissed.

Justices *Nott, Johnson, Gantt, Richardson and Coke* concurred.

A. BROWNE & CO. vs. JONATHAN COIT.

Where the defendant accepted a bill of exchange, upon condition that he sold certain goods of the drawer before the bill became due, which goods, before the bill became due, were attached by a creditor of the drawer in the hands of the acceptor, and before they were sold, the Court *Held* that the defendant was not bound by his acceptance.

IN this case, a bill of exchange was drawn on the defendant in favor of the plaintiffs by *A. B.* of New-York, who had consigned goods to the drawee for sale. Before the goods were sold, the bill was presented for acceptance, and refused. *Coit* however said, that if the goods were sold when the bill became due, he would pay it, and of this, due notice was given to the drawer. Before the bill was due, and before the goods were sold, they were attached in the hands of *Coit* by the creditors of *A. B.* *Coit* was applied to for payment on the day the bill became due, and refused. The goods have been since sold with the consent of all parties, and the proceeds left in the hands of the defendant to await the result of this action. If the plaintiffs fail, the attaching creditors are to take.

A verdict was had for the plaintiff.

A motion was now made to set aside the judgment, and to order a non suit.

Mr. Justice *Huger* delivered the opinion of the court.

If the defendant be liable on his conditional acceptance, he must be regarded as a creditor in possession, and the attachment must be dissolved. If he be not liable, the holder of the bill can have no lien on the goods, as it was taken on the general credit of the drawee. (*Chitty* 199.)

The only question then is, as to the liability of the defendant? His acceptance being conditional, he could only become liable on the performance of the condition. He agreed to pay the bill on the day it was due, if he could sell the goods; but before that day the goods were attached; and it was, by operation of law, out of his power to sell; they had in the words of the act "been made liable in law to answer any judgment that shall hereafter be recovered and awarded upon that process." The event then did not occur upon which he was to become liable, and its non-occurrence was not the effect of his contrivance, nor was it in his power to avoid it. If a merchant undertake to accept a bill, on condition that a cargo of equal value be consigned to him, and the cargo consigned be not of equal value, he is not bound to accept. (*Douglas*, 297.) Or if he promise to pay a bill, provided a certain vessel consigned to him shall arrive, and she is lost, he is not liable. If he accept on any condition, the performance of which is prevented by the act of God, he is not liable; neither can he be liable when the condition is prevented by an act of the law. (*Chitty*, 199, 200.) The motion in this case must therefore prevail.

Justices *Nott*, *Johnson*, *Gantt* and *Colcock*, concurred.

JOSEPH BROWN vs. R. SHAND.

There is no precise form of words necessary for a will of personal property, but whatever form be adopted, it must always be made to appear that the intention of the testator was fixed and determined.

An appeal from the Ordinary of Charleston district.

IN this case, it appeared that, *Robert Haig* died, leaving three testamentary papers.

The first was dated in 1810, and was signed and sealed by the testator, and attested by three witnesses. In this will, by which the whole of his property was disposed of, *Whitford Smith* was left a legacy of \$500, and was appointed an executor with two others.

Some time after the execution of this will, *Haig* became dissatisfied with the conduct of *Smith*, and mentioned to one or two of his friends that he would alter his will; and to one that he had altered his will, in consequence of the ill conduct of *Smith*. He further stated, that he meant to provide for *Mary*, (his slave,) and her children. In pursuance of this intention, and before April, 1813, he drew up instructions, from which he said another will should be drawn. These instructions were in his own hand-writing, but were neither signed, sealed, nor dated; and no mention is made of *Smith*, either as legatee or executor. At the bottom of the page on which the instructions were written, and where the testator's name is usually signed, after "my executors," are written three names, only one of which is found in the will of 1810. By this memorandum, his "real and personal property" were mentioned. A Mr. *Brown* was requested by *Haig* to draw a will in conformity to the instructions, which was accordingly done on the 21st of April, 1813. This paper was not signed; the usual words of attestation were added, but not subscribed by any witness.

On the back of this paper, and in the hand-writing of *Haig*, was commenced another will, in the following words:

"The last will and testament of *Robert Haig*, of the city of *Charleston*, *State of South-Carolina*, carpenter. I will and bequeath to my beloved niece *Mrs. Lockey*, 250 shares in the *Union Bank*." Nothing more was added.— This legatee got nothing by the first will, and only 200 shares by the memorandum, and the will drawn by *Brown*.

Evans, one of the executors named in the memorandum, and in the will drawn by *Brown*, was with *Haig* when he died, and for some days before. He (*Evans*,) represented *Haig* as very feeble on the day before he died, but in his senses. When asked on that day to sign the will, drawn by *Brown*, *Haig* replied, "to-morrow." When interrogated about the distribution of his property, he said, he wished to leave something to charitable societies, naming two. Neither of these societies were mentioned in either of the wills, or in the memorandum. It did not appear that the testator left any real estate.

The Ordinary decided in favor of the second testamentary paper, (the memorandum of instructions.)

On an appeal to the Circuit Court, his decision was reversed, and the first will established.

A motion was now submitted to reverse the decision of the Circuit Court.

Mr. Justice *Huger* delivered the opinion of the court.

There is no precise form established for a will of personal property, but whatever form be adopted, it must always be made to appear that the intention of the testator was fixed and determined. In the language of one of the elementary writers, (1 *Swinburne*, 12,) referred to, it must be complete and perfect, and not left unfinished, to be completed at another time. The preservation of the will of 1810, the declarations of the testator, that he intended the memorandum as something from which a will was to be drawn, the non-execution of the draft which was always in the testator's power from 1813 to 1819, when he died, the commencement of another will on the back of the draft in his own hand writing, nearly as variant from the memorandum as the memorandum was from the will of 1810, his declarations even as late as the day before his death, that he intended to leave legacies to two charitable societies not mentioned in his memorandum, are facts that fully authorize the inference, that the intention to establish the memorandum, and to revoke the will of 1810, was ne-

ver fixed and perfect, although the testator may at times have thought of doing so. The cases from *Phillemore*, as well as all the other cases referred to by the appellant's counsel, only shew that from different facts, a different conclusion has been drawn. In most of them, death followed so soon after the issuing of instructions, as not only to have prevented the execution of the wills, but to have excluded the probability, if not the possibility of the testator having changed his mind. He would have signed had he lived, is the irresistible inference in each; but what becomes of this inference, when *six years* intervene between the completion of the draft, and the death of the testator? I think, reversed, he would have executed it, had he approved, is at least an authorized presumption. In the case of *Walker vs. Walker*, (1 *Mirivale*, 503,) a testamentary paper formerly drawn, signed and sealed, but which had words of attestation and no witness, was ruled to be no will; because, from the words of attestation, it appeared that the instrument was intended to have been witnessed, and as it was never witnessed, the intencion had never been complete and perfect. This case goes very far; further, I think, than I should be disposed to go; but should a jury so decide, I should not feel myself authorized to say, they were wrong.

The motion is refused.

Justices *Bay*, *Nott* and *Johnson*, concurred.

Mr. Justice *Gantt* dissenting, delivered the following opinion:

I dissent from the opinion delivered in this case, on the ground, that the decision made by the Ordinary in favor of paper B. as the last will and testament of *Robert Haig*, in opposition to the paper A. was strictly correct and legal. Paper B. was written, as appears by the evidence, after that of A. had been duly executed. It was in the handwriting of the testator himself, and as the last will governs, the former testamentary paper A. was *ipso facto*, revoked. Nothing remained to be done by the testator to per-

fect the paper B. as his will. If the intention of the testator was left equivocal, after an act so plainly demonstrative of a revocation of the paper A. as was evidenced by the paper B. the declarations of the testator were sufficient to remove all doubt. He said to *Elfe*, that he had made a new will, and that he had left out *Smith*, who had been named executor in his former will, with other declarations, shewing that the new will alluded to, was the paper B.— Thus considered, I think paper A. was legally revoked by the act of the testator in writing paper B. and declaring as he did, the latter to be his will. The doubt which the case affords, in my opinion is, whether the paper B. was revoked in turn by paper C. Now I lay no stress upon the circumstance of this paper C. having remained for a considerable time in the possession of the testator unexecuted as he intended, to-wit, by the attestation of witnesses. Those were unnecessary formalities, (being of personal estate.) The day previous to the testator's death, he declared C. to be his will, and that he meant to execute it the next day. He was prevented by the act of God from completing his intention, and this circumstance from the authority of the case quoted from *Phillemore's Reports*, 72, gives efficacy to the intention of the testator, and would establish the paper C. as his last will and testament; and this intention ought in justice to be carried into execution, where it can be done consistent with the rules of law. I am inclined to think that C. might have been considered without any violation of legal principles as the last will and testament of the testator. But if it could not, then the paper B. remained of force and unrevoked. Whether the paper B. was revoked by that of C. is rendered doubtful from the circumstance that the testator declared an intention of doing a farther act before C. was to be considered as complete. Admit therefore that the latter was not perfected according to law, then B. remained unrevoked and of force. I am inclined however, upon the whole of the case to consider the paper B. and the memorandum on the back of C. all in the hand writing of the testator himself,

as constituting his last will and testament. The design of the testator in the memorandum alluded to, was merely to enlarge a bequest given by the paper B. and whilst it affords additional evidence of the revocation of A. is a tacit recognition that B. was designed as his last will and testament. In thus hastily declaring my dissent to an opinion otherwise unanimous, I am free to acknowledge the distrust I entertained as to its correctness; but believing that I have the sanction of law for its support, I should be unfaithful to myself to withhold the expression of my opinion.

WILLIAM GREENWOOD, *et al.* vs. WILLIAM NAYLOR.

Where a *fi. fa.* was lodged in the office of the sheriff of the district of Charleston, marked "*lodged to bind,*" which the court considered as a stay, and a *fi. fa.* subsequently delivered to the City sheriff with an order to "*levy and sell,*" and the City sheriff accordingly sold the personal property of the defendant, and had the proceeds in his hands; upon a rule the Court *Held* that the execution first *delivered* should be first paid.

An execution stayed does not lose its *binding efficacy*, only its *active quality*; and one being lodged in the office of the sheriff of the district of Charleston, and the other in the office of the City sheriff of Charleston, does not vary the application of this rule.

Tried in the City Court, July Term, 1820.

THE Recorder reports the case as follows: "A rule was served upon the City sheriff, to shew cause, why he should not pay over to the actors, a sum of money in his hands, arising from personal property sold by him under a writ of *fi. fa.* in the case of *Lowden vs. the same defendant.* The actors had lodged their executions in the office of the sheriff of Charleston district, before Lowden had delivered his to the City sheriff; but the former had indorsed upon their executions "*lodged to bind,*" and the latter had ordered the city sheriff "*to levy and sell.*" The City sheriff, accordingly sold the personal property of the defendant and had the proceeds in his hands. Under these circum-

stances, the City sheriff shews for cause, why the money should not be paid to the actors, that it had been claimed by *Lowden* upon the ground, that as his execution was the only one executed, he is exclusively entitled to the money made under it.

"It was contended by the actors, that the executions lodged first must be first paid; that they bound the personal property of the defendant *from the time of their delivery*, and therefore that the City sheriff was bound to pay to them the money which had arisen from a sale under a younger execution.

"On the part of *Lowden*, it was urged, that the City sheriff was bound to deliver to him the money made under his execution; that the actors, by enforcing their executions might have been paid before him, but by indorsing "*lodged to bind*," they shewed their intention that the sheriff should not proceed; and accordingly that he had done nothing. That admitting, abstractedly, the prior right of the actors, their permitting the defendant to remain in the possession of his property, without taking any steps against it, amounted to a legal fraud, which gave a preference to a junior creditor acting upon his rights. It was likewise insisted upon, that the sale having been made under a *fi. fa.* issuing from the *City Court*, the *City sheriff* had no right to pay any attention to the liens upon the defendants property, which existed *in the office of the sheriff of the district*.

"The Statute of Frauds says, that no writ of *fi. fa. &c.* shall bind the property of the defendant, but from the time that such writ shall be delivered to the sheriff *to be executed*. The actors did not deliver their executions "*to be executed*;" but on the contrary, they were delivered not to be executed; for certainly the words "*lodged to bind*", meant that they were to be retained by the sheriff without proceeding upon them; it being presumed according to the prevalent practice, that if any junior execution creditor should have the debtors property sold, that the proceeds would be appropriated towards the satisfaction of the executions, in the order of their dates. Had directions been given to the

sheriff to proceed to levy and sell, and he had not done so, he might have been responsible to the actors, but such were not the directions. Under these circumstances, I should say, according to the common law, the Statute of Frauds and the English decisions, that the sheriff would be bound to pay the money in his hands to *Lornden*. There are very many authorities in support of this opinion. I shall merely refer to the following, in which, perhaps the precise point in issue, under this rule, is the most directly illustrated, i. e. (*Smallcomb vs. Buckingham*, 2 *Esp. Dig.* 241. *Rice vs. Serjeant*, 7 *Mod.* 37. *Kempland vs. Macaulay*, *Peake's N. P.* 65. *Payne vs. Drewe*, 4 *East. Rep.* 523.) But I think the decisions have been otherwise in this State. In the case of *Snipes vs. The Sheriff of Charleston District*, (1 *Bay*, 295,) the Court said, "an execution does not lose its *binding efficacy* on the expiration of a year and a day, only its *active quality*; and that when sales were made under younger executions, the goods were subject to all prior ones, and they must be paid off, in order, agreeably to their seniority." It is clearly to be collected from the statement of this case, and the language of the Court, that the elder execution had been merely lodged in the sheriff's office, without any directions to proceed, or with directions not to proceed. If such were not the directions, either expressed or implied, it is unintelligible, why the sheriff should have levied and sold, exclusively, under the younger execution. It is an unavoidable presumption, that if under the older execution, there had been directions to levy and sell, that those directions would have been conformed to, as they were in the case of the younger execution. If the fact were otherwise, the sheriff would have been responsible. The circumstance of upwards of a year and a day having elapsed since the lodging of the *fi. fa.* would have been immaterial, if there had been a levy; because, notwithstanding such a lapse of time, the sheriff could have proceeded to sell. (See *Gibbes vs. Mitchell*, 2 *Bay*, 123-4.) Considering myself bound by our own adjudications, I ordered the rule to be

made absolute, and the city sheriff to distribute the money in his hands among the creditors of the defendant, according to the dates of their respective liens. I did not think that any difference was created in the application of this rule, by the executions having been lodged in different offices. A notice that this decision would be appealed from was served upon me ; the grounds are inclosed."

The plaintiff in the City Court now moved the Constitutional Court to overrule the decision, and to order the money made under his execution to be paid to him, on the grounds,

1st. That an execution delivered to the sheriff, marked, "*lodged to bind*," never enforced, and returned "*nulla bona*," was not in law entitled to a priority over an execution subsequently lodged, *with orders to proceed*, and under which the money was made.

2d. That by permitting the goods to be sold, the execution of appellees, even admitting their prior lien on the goods, cannot in a court of law follow the proceeds or money arising from those goods, in the hands of a third person.

3d. That to bind the goods of a defendant, an execution must be lodged with the sheriff *to be executed*.

4th. That the City Sheriff, after making the money under an execution in his office for the appellant, could not pay the money to another execution in a different office.

5th. That without alleging or supposing any moral fraud on the part of the appellees, their permitting the defendant, *Wm. Naylor*, to remain in possession of the property, without taking or ordering any proceedings against it, amounted to a legal fraud, which gave a preference to the execution of the appellant.

Mr. Justice *Richardson* delivered the opinion of the court.

After the report and opinion of the City Judge, the grounds of appeal require little discussion. The case of *Snipes vs. The Sheriff of Charleston District*, ap-

pears to me to have settled the main question; and the practice has been so uniform under that decision, that it ought not to be now disturbed. The Court of Equity too, appears to have adopted the same rule. (See 3d *Equity Reports*, 539.) So that the decision in 1st *Bay*, has been well supported. Whatever is determined upon such authority establishes the law, and makes a precedent for future cases. (4 *Burr.* 2545. 7 *Term*, 668.)

The motion is dismissed.

Justices *Johnson*, *Gantt* and *Colecock*, concurred.

JOHN TAYLOR vs. ROBERT HOWREN.

Where a sheriff was ruled by a plaintiff for not collecting the money under a *f. fa.* and shewed for cause, that he had levied upon a horse, the only property he could find, which horse had been taken out of his hands by a writ of replevin of a third person, who claimed the horse, the Court *Held*, that the sheriff was bound to obey the writ, and that the cause shewn was sufficient.

Tried before Mr. Justice *Gantt*, Georgetown district.

THE plaintiff had obtained a rule against *Moses Fort*, sheriff of *Georgetown* district, requiring him to shew cause, why an attachment should not issue against him for a contempt of court, in not making the money under a writ of *feri facias*, agreeably to the exigency thereof.

Upon the return of the rule, the sheriff shewed for cause, that he had levied upon a horse, the only property he could find of the defendant; which horse had been taken out of his hands by a writ of replevin, issued at the suit of a third person, who claimed the horse as his property.

The Judge ruled the cause shewn to be sufficient, because the sheriff was bound to obey the writ.

From this decision the plaintiff appealed, and moved the Constitutional Court to reverse the same, and make the rule against the sheriff absolute, on the following grounds:

1st. That the said decision of the court had neither law nor authority to sanction it.

2nd. That the doctrine supported by the said decision, is unreasonable, and would, if established, have a serious effect in delaying the justice of the country.

Mr. Justice *Richardson* delivered the opinion of the court.

The court will not unnecessarily anticipate the question, whether the writ of replevin lay at the suit of a third party, to regain possession of a horse taken by the sheriff as the property of another. That question will arise necessarily in the case of replevin. For the case before us, it is enough to say, that the presiding judge having deemed it competent to issue the writ in such case, does, at least, shew, that the sheriff might well have so thought; the officer is therefore shielded from the charge of contempt of the process of this court. The writ and the execution, both issued under the seal of this court, which to obey was at least matter of great consideration. If the officer erred, there is still no ground for attachment where the point is not clear.

The motion is therefore unanimously dismissed.

Justices *Nott*, *Johnson* and *Colcock*, concurred.

Taylor, for the motion.

_____, contra.

THE STATE VS. THE SHERIFF OF CHARLESTON DISTRICT.

Upon a rule against the sheriff to shew cause why certain money collected for fines inflicted in the court of sessions should not be paid over, the Court *Held* that the sheriff was not entitled to retain 5 per cent. for his commissions upon the amount collected; and that the clause of the county court act under which he made such claim was repealed by the Judiciary act of 1798, and that the act of 1791, regulating the fee bill, repealed all former acts allowing costs, and allowed none in this case.

THIS was a rule to shew cause why certain money collected for fines inflicted in the court of sessions should not be paid over; the sheriff having detained five per cent. for his commissions upon the amount collected. This rule having been made absolute, the motion was to set aside the order of the presiding judge, upon the ground: That the sheriff was entitled to five per cent. commissions upon such collections of money, by virtue of the county court act of March, 1785, (See *Public Laws*, 376, 377,) which enacts, "and where any taxes, &c.—shall remain uncollected upon the death or removal of any sheriff, his successor shall have the power to collect, &c.—the same as the sheriff into whose hands they were originally put, &c.—and such succeeding sheriff shall forthwith take possession of all books and papers belonging to the office of such deceased or removed sheriff, &c.—and every sheriff *shall have and retain for all public debts and demands or officers fees by him collected* an allowance of £ 5 per cent. for his commissions therein."

Mr. Justice *Richardson*, delivered the opinion of the court.

It must always be borne in mind, when costs are claimed by any officer, as well as by an attorney of this court, that unless such costs are expressly given by statute, none can be allowed. Admitting that the clause quoted, might literally embrace this case, which is questionable, it is a clause of the county court act and was evidently intended to regulate the commissions of the former county court sheriffs in certain cases. That clause too, together with most of the provisions of the county court act, was repealed by the Judiciary act of 1798. The act also of 1791, regulating the fee bill expressly repeals all former acts allowing costs to the officers of this court in these words; i. e. "that all former acts, &c.—for regulating, &c.—salaries and fees throughout this state, or in the districts or counties thereof, &c.—shall be and the same are hereby repealed." This

repealing clause appears general enough to put an end to all former acts, customs and usages upon the subject of costs, &c. In any view, as no act is found which gives expressly a right to the supposed costs, the common law rule which allows no costs, must be applied.

The motion is therefore refused unanimously.

Justices *Colcock*, *Johnson*, and *Natt*, concurred.

Delesseline, for the motion.

———, contra.



WM. WELLS VS. WM. SPEARS.

An express warranty of title does not exclude an implied warranty of soundness.

Tried before: Mr. Justice *Huger*, Beaufort district, April, 1820. Motion for a new trial.

THIS was an action of assumpsit upon two notes of hand, one for \$300, and the other for \$200. The defendant pleaded *non assumpsit*; and in bar, that the notes were given in consideration of a negro woman and her child, sold by plaintiff to defendant, "as sound and free from all diseases, when in truth the said negro at the time of the sale was afflicted, and had been for a length of time, with some incurable disease, of which she died in a short space of time after the purchase; in consequence of which, the child being young, became and has been an expense and trouble to the defendant."

The defendant proved, that the notes were given for the negro wench and child; and as evidence of the contract, produced a bill of sale in which was the usual warranty "against all persons claiming, &c." The wench had a child a year old. After she had the child, she looked thinner and not as well as before. She ran away from the plaintiff a few weeks before the sale, crossed the great *Salt-etcher* and lay in the swamp near defendant's plantation.

Defendant gave information to the plaintiff, and, on the plaintiff's coming for her, the defendant agreed to purchase, and kept her in his possession, till the writings were executed. The wench was said to be worth \$500; and at the time of executing the writings, defendant boasted that he had made a good bargain, if the wench turned out to be sound. Soon after the purchase, the wench was taken sick. The defendant called medical assistance, but in the last stage of the disorder, and she died in a few days after. Defendant offered to return the child, which plaintiff refused. After the wench died, the defendant sent to the plaintiff to bring the notes and they would settle, &c. There was no express evidence connecting the disease with which she died with any previous indisposition, nor that she was afflicted with any incurable disease before the sale.

The presiding judge in his charge to the jury, merely stated the facts, without directing the jury as to the weight of evidence.

The jury found a verdict for the defendant.

The plaintiff moved for a new trial on the following grounds;

1st. That the contract being in writing, could not be contradicted, varied or supplied by evidence of an inferior nature.

2nd. That there was an express warranty of property which excluded any other warranty by implication.

3rd. That there was no evidence of fraud, concealment or misrepresentation, on the part of the plaintiff; on the contrary it appeared, that the defendant purchased with a fair opportunity of knowing the value of the property, and at his own risk.

4th. That the defendant did not contract to pay such a price as would raise an implied warranty of the soundness of the property.

5th. That it did not appear, that the slave in question had any incurable disease before the sale.

6th. That there was no evidence of any connection be-

tween the disease of which the slave died and any previous disease.

7th. That it did not appear that the slave received proper medical treatment in her last sickness, or that she would have died, had she not been improperly treated.

8th. That there was no ground for rescinding the contract for the child, but the jury ought to have found the value of the child for the plaintiff.

Mr. Justice *Richardson* delivered the opinion of the court.

Whether the negro wench was diseased at the time of sale or not, was a fact for the jury to determine, and, tho' questionable, the court cannot perceive that the verdict is against the evidence, in that particular. It is unnecessary to detail the testimony. But a question of another kind and of some difficulty, is presented, to wit, whether, where an express warranty of the title to a chattel is made, there can be an implied warranty of its soundness; and many authorities have been adduced to shew, that where there has been *one* warranty expressed, *other* warranties are excluded. (*Bac. Warr. Phillips* 422. 2 Day 23. 4 Dallas 440. *Peake* 15.) As a general rule, this position is just, but where we consider, how repeatedly it has been adjudged in this state, that wherever a chattel is sold for a full price, such sale *per se*, implies a warranty of the *physical* soundness of the chattel, and how many recoveries by reason of the unsoundness of chattels sold, have been predicated upon bills of sale with only the usual express warranty: "against all persons claiming, &c." as in the case before us, it would be inconvenient, and would probably be a misconstruction of the real intention of parties to such bills of sale, were we at this day to decide, that the express warranty of title excludes the implied warranty of soundness. The express warranty can be no more than presumptive proof of the exclusion of all other warranties; and this may be well counteracted by opposite presumptions, arising from general practice, and the course of ad-

judications, made without objection. These shew the general opinion and intention of parties in similar contracts, and like every general usage must have great influence upon a question involved in any doubt. I predicate my own opinion mainly upon this consideration, but it must not be lost sight of, that the maxim of a sound price implying a warranty of physical soundness in the chattel purchased, is said to be derived from the civil law, and that, without the presumption of warranty by the vendor, whenever the chattel bought is lost by reason of some inherent defect, the price is to be restored to the purchaser as money which had been received by the seller without any consideration, and as, therefore, equitably belonging still to the purchaser. And this view of the maxim and its origin, probably gave rise to the practice of considering the express warranty of title, as not excluding the implied one of soundness. But however introduced, or for what purpose, the general understanding and practice upon any subject are to be respected; and however we may differ in the origin, or perceive not the reason, I am disposed to treat them with something like the respect due to ancient rules of law, and with the hope "that at some other time, in some other place, on some other occasion, the wisdom may appear."

It is to be observed too, that there are not wanting instances, where express warranties do not take away warranties in law, or implied warranties, as in *Noke's case*, (4 *Repts.* 81.) As, if a man leaseth for life and farther bindeth himself and his heirs to warranty, here the express warranty doth not take away the warranty in law; for, if he in reversion granteth over his reversion, and the lessee attorneth, and afterwards is impleaded, he may vouch the grantee by the warranty in law, or he may vouch the lessor by the express warranty. (See 1st *Inst.* 384.) But tho' a majority of the court are of opinion that the express warranty does not in this instance exclude the implied warranty, and would not disturb the verdict, because it may be doubtful whether the wench was sound or unsound

at the time of the sale; yet there could be no reason in finding a verdict for the defendant generally; as the child remained sound, and was an integral part of the consideration, and must have been worth money. A new trial is therefore ordered, unless the defendant, according to his former offer, shall return the child to the plaintiff within the space of three months.

Justices *Johnson, Huger, Gantt, and Colcock*, concurred.

Chipman, for the motion.

Ellison & Smith, and *Petigru*, contra.



PETER COSACK vs. DESCODRES & CROVAT.

On a sale of lands, the following receipt was held sufficient to take the case out of the Statute of Frauds, viz. "Received of C. \$20, being on account of a plantation on the *Cypress*, sold to him this day for two thousand two hundred dollars, payable in different instalments, as per agreement." (Signed) D. & C.

THIS was a special action on the case, brought for a breach of the following agreement:

"Received of Mr. *Peter Cosack*, twenty dollars, being on account of a plantation on the *Cypress*, sold to him this day, for two thousand two hundred dollars, payable in different instalments as per agreement. *Charleston*, August 1st, 1816.

\$20.

Descoudres & Crovat."

J. Stewart proved that on the 6th August, 1816, the defendant said that the plaintiff was to have met him, in order to make the first payment of \$500, and to receive titles for the land, but that business would carry him (*Crovat*) out of town, and the titles could not be made in his absence. He said that he would make another appointment with the plaintiff whom he knew to be a punctual man. *Crovat* added that he had been offered \$2500 for the land. He further stated that the plaintiff was to pay

\$500 in cash, and the balance in three payments. Mr. Stewart also said, that Mr. Stevens afterwards purchased, and took possession of the same land. The witness valued it at \$2500 by general opinion. He thought that the plaintiff had suffered inconvenience and loss in not getting the place, &c. That he had formerly lived there, and his stock would stray back to it.

Enos Easter proved that on the 13th August, 1816, he was at Crovat's, and heard the plaintiff demand titles of Crovat and said, he was ready to comply with his contract, at the same time taking out his pocket book; but, Crovat, refused to give titles. The witness saw no money, but the pocket book was laid on the counter; Mrs. Crovat observed, that she would not assign her dower; and said, "return the money received and take up the agreement;" but the plaintiff refused to receive the money he had advanced, and insisted upon the bargain, and declared, he would take possession of the place; when Crovat observed, he could do no such thing.

Upon this testimony, the jury found a verdict of \$300. and for \$20 more, with interest upon the latter sum from the date of the agreement.

Upon this finding, the defendants moved for a new trial, and for a nonsuit upon the following grounds:

1st. Because, the agreement relied on, was not executed within the meaning of the Statute of Frauds.

2nd. The evidence was insufficient to establish the case, even though it should be thought that the agreement, for the sale of lands, under such circumstances as existed in this case, need not be in writing.

3rd. The plaintiff proved no money tendered under the alleged agreement; nor was there any proof of a demand to execute titles, nor any satisfactory evidence to shew that the plaintiff had sustained any real damage, or when, or for how long a time; and the jury gave excessive damages.

Mr. Justice *Richardson* delivered the opinion of the court.

That the defendants contracted to sell to the plaintiff a tract of land for \$2200, and that they received \$20 in part payment, are unquestionable facts. That the plaintiff very soon after, demanded titles, after tendering the first instalment, or at least was offering to tender the money, when he was stopped by *Crovat's* expressly refusing to make titles, are equally certain. The plaintiff having offered to perform his part of the contract, and the defendants refusing to do the like on their part, gives a right of action; provided the contract was originally binding in law.

The objection to the contract is, that it is not according to the Statute of Frauds, &c. (29 *Charles*, 2, C. 3. *P. L.* 82,) in not having been reduced to writing, &c.

This Statute enacts, &c. "that no action shall be brought, &c.—upon any contract or sale of land, &c.—unless the agreement, &c.—or some memorandum or note, &c.—shall be in writing, and signed by the party so charged therewith, or some other person thereunto by him lawfully authorized."

In the case before us, the receipt was an intelligible note in writing, and signed by the defendants. It imports the assent of both parties, both in its terms, and by the acts set forth; which is what the statute requires. It is enough that the writing signed by one, imports an agreement and has been accepted by the other. It need not be signed by both. (See 1 *Vesey*, Jun. 326. *Roberts*, 109.) This is indeed well illustrated by an ordinary mesne conveyance, which is signed but by the donor. No particular form is required by the statute. (2 *Vent.* 361. 1 *Vern.* 110. *Peake*, 217.) It is enough, if intelligible. I apprehend that there can be no question, that in such a case, the court of equity would specifically enforce the contract. (3 *Taunton* 175. 3 *Wooddeson* 468. 1 *Vesey*, Jr. 326, &c.) And where that court ought to give specific relief, this court, under the same testimony, will give damages; for

though the courts differ in the mode of proof, and in the manner of giving relief to the injured party, yet in a question of right and for the enforcement of law, which is the end of both courts, they agree.

But besides the receipt in writing, it appears well settled, that the payment of a substantial part of the purchase money is such a part performance as to take a case out of the statute. (*Roberts* 153. 1 *Vernon*, 472. 3 *Atk.* 4. *Vesey* 82. 4 *Vesey*, Jr. 720. Now upon this point, the receipt is plain. "Received on account of a plantation, &c." sold to him for \$2200, &c. The twenty dollars, by the literal import of the receipt itself, is plainly a payment.

I need not notice at large the objections to the verdict, arising out of the facts in evidence. The plaintiff's case was very well made out. Justice is on his side; as the defendants had wilfully broken their contract, and, that too, most evidently for gain. In such a case, seeing that the plaintiff's claim was legal, the jury must have given very heavy damages before a new trial would be granted. But they appear to have taken as a measure of damages, the probable gain to the defendants, arising from their breach of the contract, which is a rational measure of the amount of the loss to the plaintiff from the same cause.

The motion is therefore refused.

Justices *Johnson* and *Huger*, concurred.

Mr. Justice *Gantt*, dissented.

King, for the motion.

Cogdell, contra.

JOS. JONES VS. THOMAS DUGAN.

The law adjudges the possession to be in the person who has the right, and such constructive possession is sufficient to enable the owner to maintain an action of trover.

Where there is an unlawful conversion, no demand is necessary; and any withholding of the property against the will of the owner is evidence of conversion.

A defendant, after verdict can not make an objection to the authority of a person who made the demand, in a case of trover, when no objection had been made at the time of the demand, and when the refusal was not on the ground that the party did not produce such authority.

The Statute of Limitations can not be given in evidence under the general issue in an action of trover, but must be specially pleaded.

THIS was an action of trover for a negro woman, tried in Charleston, Spring Term, 1820.

The plaintiff obtained a verdict; and this was a motion for a new trial.

Mr. Justice *Nott*, delivered the opinion of the court.

It is not denied that the plaintiff had a good reversionary interest in the property in question; but the defendant's counsel appear to have overlooked the fact that the life estate had terminated previous to the commencement of this action. The whole interest therefore being vested in the plaintiff, the three first grounds taken in the brief, must fail. The motion depends upon the following grounds:

1st. There was no evidence that the plaintiff ever had possession of the property.

2nd. It did not appear that the persons who demanded the property had any authority to make the demand.

3rd. The defendant was not permitted to give the statute of limitations in evidence under the general issue.

The experience of every day furnishes evidence of the law on the first point. Executors and administrators may maintain trover for property converted, during the life of their testators on intestates, and consignees for property of which they have never obtained possession. The law adjudges the possession to be in the person who has the right; and such constructive possession is sufficient to enable the owner to maintain an action of trover. The object of the action is to try the right of property, and the object of the demand to afford the person in possession an opportunity to deliver it up without costs, if he have no claim. But where there is an unlawful conversion, no demand is ne-

cessary ; and any withholding of the property against the will of the owner is evidence of conversion.

If the defendant had called for the authority to make the demand, and had made the non production of it, the ground of refusal, it would have been a good ground of defence. But it will not avail him when no such objection was made, and particularly after verdict, when the court sees that the defendant has actually converted the property in defiance of the plaintiff's right.

3rd. On the third ground, it is unnecessary to go into any reasoning from analogy. The law is well settled, that the statute of limitations cannot be given in evidence under the general issue, in an action of trover, but must be specially pleaded.

The motion therefore must be refused.

Justices *Johnson, Huger, Gantt* and *Colcock*, concurred.

N. B. *The case of Jackson and Jones was decided by this case.*



JAMES H. WHITE vs. JONATHAN HELMES.

A free negro is an incompetent witness in any case where the rights of white persons are concerned.

It is not necessary to a will of personal property that it should have two witnesses ; nor any, indeed, so the hand writing of the testator can be proved. (a.)

It is not necessary to constitute a paper a will, that the *animo testandi* should appear on the face of the paper.

Will. *Caveat.*

THE testimony in the case was as follows :

Henry Verner was first sworn, and on being questioned as to his knowledge of the instrument offered for probate, deposed as follows : That *Daniel Leger* twice sent for him on the morning of the third of April by two servants ; that he hastened to the residence of the deceased, and found him very sick ; that after the usual salutations, *Leger* requested him to draw some writings for him ; that be-

lieving *Leger* wanted his will written, he observed that he did not know the form of one, but that he would write down what he (*Leger*) wanted written ; that he then wrote the following lines, word for word as directed by said *Leger* :

“ I give to *Jonathan Helmes* all my lands and negroes, tools, household furniture, hogs and rice and bacon ; to *James White*, I give all my cattle.”

April 3, 1820.

Daniel Leger.

He then read the instrument to *Leger* ; *Leger* then took it, and being raised up in his bed, signed it. He said that himself and *Leger* were not intimate, and seldom saw each other more than twice or thrice a year. He resided about a mile from *Leger*, and knew him well by sight. He believed him to be of sound and disposing mind, memory and understanding at the time he signed the instrument. When he asked *Leger* why he did not give his property to his relations, he replied, “ that he had not been well treated by them ; that Mr. *Helmes* was a good man, and that he wished him to have his property.” *Verner* was again questioned as to the sanity of the testator, and replied, that he believed *Leger* to be as rational as himself at the time he signed the instrument ; and during his conversation on the subject of the disposition of his property, that as often as twice he heard *Leger* say *White* should not have his property. On cross-examination, *Verner* said, *Leger* never told him he had sent for him ; that there were none but negroes at *Leger's* when he arrived at his house ; that he dated the instrument when he went home, the same day it was written ; that the *h* and *d* interlined were made at the same time, as a correction of the spelling. He staid with *Leger* one hour, and that the only conversation had with him during that hour, was that already stated ; that he believed him to be in his right mind from the reasons already stated and none others ; that from the manner in which *Leger* spoke and his looks, he did not believe he would die ; that he sat in his bed and took a

drink of water just before he left him, but that he drank it with pain. Mr. *White* said he was no relation, and deceased had other relations besides *White's* children. It was three or four months previous to the death of *Leger*, when he said, "*White* should not have any of his property." This witness further said, that after *Leger* had signed the paper, he returned it to him; that while he was dozing in sleep, he heard him say "where are my negroes, they are all scattered;" that during his stay with *Leger*, his pulse was irregular and his hands cold; that there were but two negroes with *Leger*, and that two of those were sent as messengers; that though *Leger* said, when dozing, "where are my negroes, they are all scattered," he believed him, on being awaked, to be as rational as he ever had been.

Dr. *John Wragg* was next sworn for the plaintiff, and deposed, "that he was at *Leger's* on the 2nd of April, at 12 o'clock; that his disease was epidemic; that his lungs were so much effused as to render respiration very difficult. He remained with him half an hour or more, and had no doubt his disease would terminate fatally. Both *Leger* and *White* were anxious he should return the next day. He told them he would do so; but that it was more to gratify his patient and friend, than from any hope of his being able to relieve him. It was raining, and *Leger* situated between two doors, his hands as cold as though he had an ague, and servants fanning him occasionally to enable him to breath. He saw no evidence of *delirium*, his stay being only half an hour; but that he believed him to be too near the article of death, to make a legal will; and that from a consideration that *Leger* would die, he did not visit him on the 3rd. until he had visited other patients on *Pee Dee*. On his arrival, he found *Leger* a corpse.

James Britt, against the caveat, said he was well acquainted with *Daniel Leger*; that about a month previous to his death, he heard him say he would leave his property to *Jonathan Helmes*. That *Leger* and *Helmes* were very intimate, and frequently visited each other.

Charles Hopkins said, that in a conversation with *Leger* at his house in the last winter, on the subject of the disposition of his property, *Leger* said he would give his property to a person little expected, and that he would not give it to *James White*, by whom he said he had been ill treated. On cross-examination, he said *Leger* was a man apt to change his mind. He never said he would give his property to *Helmes*, nor did he say he would give it to *James White's* children.

Christopher Watts said that in June, 1819, *Leger* said to him, that neither *James White* nor any of his, should ever have any of his property. In January last, he repeated the same words. *Leger* frequently spoke of *Helmes* as a friend.

Thomas Britt said, that *Leger*, about two months previous to his death, told him he would leave his property to *Jonathan Helmes*.

Thomas Blunt said, that *Leger* and *Helmes* were intimate and frequently in company with each other.

Francis Heartly said, that he had seen *Leger* write, and that his name on the instrument now offered for probate was his own proper signature; that sometimes he spoke well of *White* and at other times very differently; that he spoke well of *White* shortly after his first marriage, but that latterly when conversing about *White*, he invariably gave him a bad character. *Leger* and *White* were remarkably intimate and friendly.

Amos Heartly said, that about two years since, *Leger* told him, he did not wish *James White* to have any of his property; that he would sooner give it to a stranger than to *James White*. On cross-examination, *Heartly* said, *Leger* was apt to change his mind.

Moses Bourne said, that early in March last, he was at *Leger's* house, and that at dinner, after some conversation relative to Mr. *White*, *Leger* said, *White* should not have any of his property or any thing to do with it.

Burrell Bird, against the will, said, that he was at *Daniel Leger's* house on the 2nd of April, between the hours

of 11 and 12 o'clock, and that he remained till 1 or 2 o'clock; that *Leger* appeared to be in great pain and agony; that Dr. *Wragg* arrived during his stay with *Leger*. He believed *Leger* to be in too much pain to make a will; that from the misery and restlessness in which he was, he did not believe him to be in his right mind; that when Mr. *Palmer* asked him, if he had disposed of his property, he replied, "no!" and muttered some other words in a tone of voice too indistinct to be understood.

Cecley Kales said, that in the fall of 1819, after the death of Mrs. *White* (the first wife of *White*,) she heard *Leger* say, that if he died before he married, *White's* children should have his property.

The counsel for *White* here brought forward a free negro to give testimony, to whom the court objected, on the ground that such testimony would be without precedent and against the policy of the state.

James White was then sworn, and said, that on the evening of the second of April, he left *Leger* and visited him again in the morning of the following day about 10 o'clock, at which time Mr. *Verner* was with him; that a short time after his arrival, Mr. *Verner* left the house, and that *Leger* appeared to be out of his senses at intervals on the night of the 2nd of April. On the morning of the 3rd, he found him much worse, and that *Leger* asked him to feel his pulse and say, if he was not much better; that he told him he was, but at the same time thought differently. *Leger* said to him, he knew he should die, and requested him to have his body decently interred; that from the incoherent expressions of *Leger* on the third, (after the will was drawn) he was certain *Leger* was not in his right mind. He was speaking of fishing and hunting, &c. *White* was the father of the next of kin to the deceased.

This was an appeal from the ordinary of *Georgetown* district.

In addition to the testimony offered before him, *Sarah Pauls* was sworn, who stated, that she knew the deceased, and heard him say, when he died, he meant to leave his

property to his sister's children. She heard him say so only once, and could not tell when or where. She had forgotten that. She took no account of it. On her cross-examination, she stated she believed it was just before his sisters death.

The appellants then introduced a negro woman, *Eliza Holmes*, admitted to have been born and bred free. She was rejected, as incompetent.

The case then went to the jury, and it was contended on the part of the appellant,

1st. That the deceased was not of sound and disposing mind.

2nd. That two witnesses were necessary to prove the will.

The jury found the paper to be the last will and testament of *Daniel Leger*.

A motion was now made for a new trial on the grounds :

1st. That competent and material testimony on the part of the appellant was rejected by the court.

2nd. That the presiding judge misdirected the jury in a matter exclusively for their investigation, in charging that, "no evidence had been given to show that the deceased had been out of his senses at any moment before the will was made," whereas the evidence of *Dr. Wragg*, of *Burrell Bird* and of *James White*, was conclusive to this effect.

3rd. That his honour also misled the jury in stating that two witnesses are not necessary in proving testaments in cases of contest, provided they are signed by the deceased ; and

4thly, (A ground not taken below,) That the paper offered to be proved as a testament was not a testament, and parol evidence was inadmissible to prove it.

Mr. Justice *Colcock* delivered the opinion of the court.

On the first ground, the court are unanimously of opinion, that the witness was properly rejected. There is no instance in which a negro has been permitted to give evi-

dence, except in cases of absolute and indispensable necessity, nor indeed has this court ever recognised the propriety of admitting them in any case where the rights of white persons were concerned. When we consider the degraded state in which they are placed by the laws of the state, and the ignorance in which most of them are reared, it would be unreasonable as well as impolitic to lay it down as a general rule that they were competent witnesses.

On the second ground, the jury were instructed, that it was their province to decide, whether the testator was of sound mind. I stated to them that the rules of law were, first, that soundness being the natural state of the human mind, insanity was not to be presumed, but that if proved to have existed before the making of a will, it was incumbent on those who wished to support the will to prove that it was made in a lucid interval. I may have said (for such was *then* and *still* is my opinion) that there was not sufficient evidence to induce them to believe that the deceased was *not* of sound mind at any time before his death; and the fact is not correct, that Dr. *Wragg* gave it as his opinion that he was insane; for he expressly says, "he saw no evidence of delirium, but believes him to be *too near the article of death* to make a legal will." In his legal opinion he was incorrect; but as to the soundness of intellect, his opinion is entitled to great weight, and added to that of *Verner*, I think, is conclusive on the subject of his sanity. What is the evidence of *Bird*? He did not believe him to be in his right mind. Why? First, from his misery and restlessness; and because when *Palmer* asked him, if he had disposed of his property, he replied "no;" and muttered some other words in a tone of voice too indistinct to be understood. No rule is better established than that the opinion of a witness is not evidence unless he assigns satisfactory reasons for the opinion; unless he be a man of science and his evidence is on a scientific subject, in which he is versed. Now what are *Bird's* reasons? The first is, because he was in misery and restless. This surely is not a satisfactory reason; for many a man suffers

greatly and yet preserves the full exercise of his mind. What is the second reason? Because he said "no," when asked if he had disposed of his property. Now it is to be recollected that this was on the 2nd of April, the day before he made his will. He had *not* then disposed of it. This answer was both rational and true; and yet furnished a ground of belief that the deceased was insane! His last reason is little better: Because he muttered some words in a tone of voice too indistinct to be understood. This may have proceeded from an unwillingness to speak, or a feeble state; both of which may have existed without insanity. His testimony then, does not prove the insanity of the deceased. *White* says, the deceased appeared to be out of his senses, but does not state any facts by which a jury could be induced to rely on the evidence.

On the third ground, the charge to the jury was correct. They were instructed that it was not necessary that two witnesses should attest the signature of the testator, or even be present at the execution of a will which was signed by the testator; but that if they believed *Verner* and *Heartly*, the one of whom drew the will and saw it executed, and the other proved the hand writing of the testator, and the witnesses who swore to his declared intention to leave his property to *Helmes* that the law was satisfied. In *Roberts on Wills*, 194, speaking of the civil law rule which requires two witnesses, he says, and such witnesses must be able at least to depose that the testator declared the writing produced to be his last will and testament; unless where the will or codicil was written by the testator himself, in which case the validity thereof may be established upon proof of the hand writing only, but it ought to be the evidence of such as have seen him write. *Swinnburne*, (1 vol. p. 11,) says, "so that with us it is sufficient to the effect of executing the testament, that the will and mind of the testator do appear." And in a note on this, a will written in the testators hand, having neither name nor seal to it, nor witnesses present at the publication, is

good, provided sufficient proof can be had of the hand writing, and though written in another man's hand and never signed by the testator, yet if proved to be according to his intentions and approved by him, has been held a good testament of personal estate. He refers to *Comyn* 452. *Bracton* 61. *Fleta* 125. *Glanville*, lib. 7, chap. 6. And in 2 *Swinburne*, 639, concerning the last question, whether it be necessary that there be witnesses of a written will, this is the answer: That if it be certain and undoubted that the testament is written or subscribed with the testator's own hand, in this case, the testimony of witnesses is not necessary; and in a note on this he refers to *Godolph*, *Gilbert Rep. Eq.* 260, that even if not signed, it may be good.

On the fourth ground, it is clear, that the law requires no particular or set form of words to constitute a will. (*Ante* 409.) "A testament, says *Swinburne*, is a just sentence of our will touching that we would have done after our death." But it was contended that it must appear on the face of the paper to have been intended to be a will; and that no parol proof could be produced to show the intention of the testator. Now it often occurs that a paper which on its face does not purport to be a will, is from circumstances considered as one; and no circumstance can be more conclusive than its being made on a death bed. *Swinburne* (1 vol. 18,) in speaking of the *animus testandi*, "which mind and purpose must be proved by circumstances, (for words alone are not sufficient,) as that he set himself seriously to making his will, being then perhaps very sick or requiring others present to bear witness," &c. &c. (*Touchstone* 404.) It is the mind and not the words which doth give life to the testament. But where these circumstances are wanting and the paper does not purport to be a will, it will be so construed if it cannot be supported as any other disposition of property; *ut res magis valeat quam pereat*.

In the case of *Thorold* and *Thorold*, Sir John Nichol says, (in deciding whether the instrument can be consid-

ered as testamentary,) the court always looks to the substance and not to the form, to the intention of the writer and not to the denomination he affixed to it; and this was called by the writer a deed of gift. So in the case of *Corp* and *Corp*, and a number of other cases cited in the argument of that case; (also, 1 *Swinburne*, p. 74.)

Now here is no consideration expressed; no delivery made. These are essential to constitute a deed. This then is not a deed. It may have been destroyed by the deceased had he lived; it therefore partook of the quality of a will in this. If then it had been found among the deceased's papers, there is enough on the face of it to have induced a court to support it as a will. But with the abundant proof, both as to the *animo testandi* and the execution of the paper, there can be no doubt on the case.

The motion is dismissed.

Justices *Nott*, *Huger* and *Richardson*, concurred.



SOLOMON COHEN VS. JOHN HUME,

A ferry-man is liable as a common carrier; and as soon as a carriage is fairly on the slip or drop of a flat, though driven by the servant of the owner of the carriage, it is in the ferryman's possession; and he will be liable for any damage which may afterwards occur to it or the horses. The carriage and horses, injured, of a person so passing a ferry, are not mere appendages of the person.

Tried at Georgetown, November Term, 1820, before his honour Judge *Colcock*.

THIS was a special action on the case by the plaintiff, the owner of a carriage and horses, against the defendant, the owner of the North Santee ferry, to recover damages for injury done to a carriage and for the loss of a pair of horses that were drowned in crossing the ferry.

On the part of the plaintiff, several witnesses were examined. The first, Mr. *Cohen*, the son of the plaintiff, stated that he was present when the carriage with ladies in it, was driven to the south side of the ferry; that the dri-

ver, a negro man, was a careful person; that in driving into the flat, he took a central direction, and got his horses and the two front wheels in, that they were as much in the center of the flat as they could be; that the left hind wheel slipped from the drop which was improperly placed on the flat, as it did not extend entirely across it; that the hind wheels slipping, the horse on the left side stumbled and got over-board. He drew the other horse after him and the carriage. The driver held by the reins, until they broke, when he caught by the wheel, having left his seat. During this time, the ferrymen were alarmed and offered no assistance; that if they had assisted, the horses might have been cut loose and saved. The horses were drowned and one of the ladies in the carriage. The ferrymen did not request the ladies to get out before the carriage was driven in, though the witness did, but they declined. The ferrymen did not take the carriage from the driver. The witness said nothing to the driver about the drop, though he saw that it was old and in bad order. The flat was old. There were two ferrymen, and one was lame. The horses cost six hundred dollars; they were gentle. The harness, which was plated and worth sixty dollars, was destroyed. The carriage was much injured. Two of the pannels were sprung and the stuffing was rotted. The width of the wheels was five feet eight inches and a half. The witness was standing near the weather house on the cause-way and behind the carriage when it entered the flat. He observed before the carriage went in, that the drop was not as wide as the flat, but he did not say any thing about it. The edges of the drop were worn away. The drop was not injured or broken by the carriage, which was a small one. The current was very strong and ran up. The ferrymen must have assisted in getting up the carriage. The ferrymen did not, he believed, direct the driver of the carriage to drive into the flat. The drop had hinges.

Dr. Pawley, the next witness, was in company with Mr. Cohen, when the carriage arrived at the ferry. The dri-

ver drove well. There was no fault, except that the left end of the flat was not drawn up as high as it should have been. The water was low. The horses and front wheels were in the flat, when the carriage went over-board. When the wheels of the carriage struck the gunnel of the flat, the flat wheeled round a little. The driver was a careful servant. The horses were gentle. One of the ferrymen walked lame. He believed the flat was properly chained, but not drawn up high enough; though he observed this before the accident, he said nothing to the ferrymen about it. He did not speak of it to Mr. *Cohen*. He told Mr. *Cohen* the ladies had best get out. He thought if the flat had been drawn up properly, it would not have happened. The road obliques as you approach the ferry. The carriage went over first. The ferrymen at the time of the accident were at the extreme end of the flat with their poles fixed.

Mr. *Trapier*, the next witness, passed the North Santee ferry in May preceding; the drop was then out of order, and also the flat. He told the ferrymen that if a better flat was not provided, he would have their master presented. The drop was too narrow, and out of order. The ferry was generally well kept. The witness thought the lame man and the other ferryman were enough for the ferry. The drop was too narrow, and it was broken in some parts. It was ricketty and shakled. He saw but one drop. Since the time he passed an excellent flat had been provided.

Mr. *Cotton*, the next witness, saw the flat in the spring of 1819, also the drop; it was as Mr. *Trapier* had described it. The boards were thin, and it was battened with thin boards. He did not know that he ever saw the flat out of order; but had often seen the drop so. It was often changed, as it soon wore out. The tide sometimes ran up. It ebbed and flowed at the ferry from 8 to 4 feet.

On the part of the defendant, the witnesses were Mr. *Campbell*, who got to the ferry 10 or 15 minutes after the accident. The ferrymen assisted in getting up the car-

riage and rendered every assistance they could. The witness was coming down the river in a boat, and was asked to assist. *Collins*, who kept the ferry worked hard.

Mr. Britt, the witness was also in the boat. The current was very strong. The negroes assisted and did all they could. They stripped and dived after the carriage. The carriage floated down the river and sunk below the slip. The current ran down the river. It aided witness's boat in bringing assistance. There was no counter current.

Mr. Hume, the son of the defendant, had measured the flat and drop. It was forty five feet long, and was nine feet eight inches wide. It was one foot ten and a half inches deep. The drop was eight feet nine and a half inches wide. It was three feet six inches long. It was only eleven inches narrower than the flat. The November after the accident, the witness saw the flat. It was no longer used at the ferry, though it was still used at the plantation. It had not been repaired. He saw it harvesting the last week. The drop was made of hard pine. The boards were one inch and a quarter thick. There were four boards and four battens. There was a drop at each end. The drop with the hinges was much worn, but it had no holes. The flat was used by the stage, twice every other night. The stage had four horses. The last time before the accident, that the witness crossed the ferry, was in April. One drop slid, and the other had hinges.

On the part of the plaintiff, it was contended that a ferryman is a common carrier, who is liable for every loss, but what arises from inevitable accident. That in this case, it could not be pretended, that there was any inevitable accident; that therefore the defendant was liable, without going into the question, whether the flat and drop were in good order, and the ferry well kept or not.

On the part of the defendant, it was urged,

First, that there was no delivery in this case at the time of the loss; that until the carriage was driven into the flat, it was in the custody of the driver, and the responsibility

of the carrier only commenced from the time when the carriage being fairly within the flat, the flat was to be carried across; that the ferrymen in this case did not undertake to carry the carriage and horses into the flat. The driver undertook to drive in, and the ferrymen after securing the flat awaited with their poles at their posts the coming in of the carriage. The loss arose while the driver was driving in.

Secondly, That this was properly the case of the transportation of passengers. The carriage and horses being but incidents to the persons in the carriage; and that the settled rule of law is, that a carrier does not undertake for the safety of a passenger in every case, except inevitable accident. That if the ferrymen would not be liable for the loss of the lady within the carriage, except in case of negligence, he could not be liable for the horses and carriage, which were as much in the custody of the passengers as their own persons, and were only transported, because the passengers were in the carriage. That in this case, the driver with the persons travelling in the carriage, without leaving their seats, passed from the road to the flat.

The judge charged the jury, (after overruling in the course of the argument of the defendant's counsel, the second ground,) that it had been settled ever since the case of *Cook vs. Gourdin*, (2 *Nott and McCord*, 19,) that a ferryman is a common carrier, and liable for every thing but inevitable accident; that the law was by no means rigorous, as our lives and property were in his hands; that it is difficult to prove whether there has been negligence or not; and therefore the law presumes it in all cases but one; that it had been made a question, whether there was a delivery; this the jury must decide; that if the slip or drop, was a part of the flat, there was a delivery; that he should think there was a delivery from the time the horses were on the drop; that the carriage being driven in by the driver, would not alter the case; that the ferryman could regulate the traveller; where the traveller drove himself, he might be considered the agent of the ferryman.

The jury found a verdict for the plaintiff of \$——

A motion was made before the Constitutional Court for a new trial on the grounds :

First, That there was no delivery in this case.

Secondly, That this was the case of passengers in which the carrier was not liable at all events.

Thirdly, That it was not proved, that the loss arose from negligence on the part of the owner of the ferry or the ferrymen,

Mr. Justice *Colcock* delivered the opinion of the court.

The verdict in this case must remain. It is not now to be made a question, whether a ferryman is a common carrier ; that has been adjudged in the case of *Cook and Gourdin* and has been recognized as the law in a subsequent case of *Miles vs. James and Johnson*, (*Ante* 157,) decided at our last sitting at Columbia. The question then was as to the delivery. If that be sufficiently established, the liability follows as a matter of course. Three of the court (my brothers, *Huger*, *Gantt* and myself) are of opinion as soon as the ferryman signifies his assent to receive the horses and carriage of a traveller, they are to be considered as delivered. If he say, drive on, or, I am ready, having fixed his flat, he is from that moment to be considered as in possession, and the driver is to be considered as his agent for the purpose of getting the horses and carriage into the flat. All carriers are permitted to regulate the manner in which the goods are to be delivered, and in many instances this is alone determined by the custom of the place. It cannot be thought too rigorous to establish this rule in regard to ferrymen. If they prefer it, and think it conduces to greater safety, they may take the horses out, and lead them in, and lift the carriages (at least such as may be lifted) and as to others they may drive them in, or cause them to be driven in. It is said, it would be an imposition on the traveller, to subject him to this control, but it seems necessarily incident to the great rea

ponsibility which is imposed on the ferryman as a common carrier.

It is further objected that it would be subjecting the traveller not only to great inconvenience, but also to great risk ; for it is not to be expected that ferrymen keep persons qualified to drive carriages, and in fact that no one would be willing, even with the responsibility of the ferryman, to trust his horses and carriage in the hands of an unexperienced driver ; but all this may, and no doubt, has been said with respect to the delivery of goods to the infinite number of bailees who are in the daily habits of receiving them ; for nothing is more common than for men to think themselves wiser than their neighbours and more qualified to do any act whatever. But when the law taking into consideration the nature of the bailments and that of the articles to be delivered, has determined what shall constitute a delivery, the parties are left free to act for themselves.

If the ferryman insists on his right to drive the horses and carriage into the flat, and the traveller does not choose to trust him, he may not cross at the ferry ; but there is in fact no ground for difficulty on this point. If a flat be in proper order and the bank in good repair, (as it is the duty of the ferryman to keep them) it is more easy to drive into a flat than through a bad road, and the necessity which would induce the travellers to get an experienced driver, would ensure the ferryman a qualified agent.

But the question of delivery must be for the jury. In *Selway vs. Holloway*, (1 Lord Raymond 46,) a case of a common carrier, three verdicts were given on the question of delivery alone, depending on a simple fact. The inquiry therefore is whether there was sufficient evidence to induce the jury to believe that there was a delivery in this case. The testimony is that the carriage was in the flat and on the drop. Now if the drop be considered as a part of the flat, the delivery was as complete as placing a bale of goods on the deck of a vessel. The drop is a necessary part of the flat, particularly where the bank is so

steep as this is at low water. But let it be supposed that it was only an appendage to the flat, a necessary instrument to effect the delivery, then by analogy the delivery ought to be considered as complete. It was contended that the delivery can never be complete so long as the thing is *in transitu* to the place or point of ultimate deposit. But this idea is refuted by the cases of a delivery, by placing on the deck or (according to the custom of some places,) on the wharf, for the ultimate place of deposit in the hold of the vessel; and so by the case from 4 *Espinasse* 261, (*Thomas et al. vs. Day*,) where the hook is applied to the bale of goods which had not yet reached the warehouse. There was still something to be done in all these cases. Suppose the ferryman had undertaken to lift this carriage into the flat, and had placed it on the gunwale to rest and from that it had slipped into the river, here it was obvious something more was to be done, yet it would not be doubted in such case they would be liable. The question then does not depend on the fact, that the thing was not yet completely disposed of by the carrier, but upon the assent of his mind, (evidenced either by his acts or language,) to take possession. What said Lord *Ellenborough* in the case of *Thomas et al. vs. Day*? The moment the hook was applied, the possession was in the warehouseman, although applied by the carman. As soon as the carriage was fairly on the slip or drop though driven by the servant of plaintiff, it was in the defendants possession. It is contended, however, that so far as relates to the transportation of carriages and horses, the ferryman ought not to be liable; for the carriages and horses are only the appendages of the persons; and the carriers of persons are not liable for their appendages; to support which it is shown that if a passenger in a stage coach loose his watch or a lady her ring or shawl, the stage coachman is not liable. There is as much analogy in law between the cases as there is in art between the things; and it is clear that a ring is not like a carriage, and still more clear that where there is no undertaking to carry and consequently no com-

pensation for carriage, there can be no responsibility for loss. The carriers of persons are not to inquire what jewels they wear, nor do they receive a greater price for a lady with a ring than for one without. But in the carriage of persons, although the stage owner is not liable at all events for an injury done to the person, yet if it be the result of negligence he is liable. (*Aston vs. Heane et al.* 2 *Espinasse's Cases*, 533. 2 *Campbell* 79.) And upon that ground the defendant in this case would be liable for the loss of the property. There is no doubt that the loss was the result of direct and palpable negligence; for the carriage would not have taken a wrong direction if the flat had been properly drawn up; and when it did take a wrong direction from the wheeling of the flat, it would not have fallen off, if the drop had been wider and perfectly sound. If it had been as wide as the flat, the jolt would not have been received.

Justices *Huger* and *Richardson*, concurred.

Mr. Justice *Gantt* concurring, delivered the following opinion :

I concur in the opinion which fixes the responsibility of the defendant in this case; because I think there was evidence sufficient to shew neglect at the time the loss happened; and further, that it was most probably occasioned by the insufficiency and bad structure of the drop of the boat, which constitutes an essential part of it, and for which there can be no excuse, as the high trust confided by the public in the grant of a ferry, and the exclusive privileges derived therefrom, oblige the keeper to be in no default. He is liable whenever the loss can be traced to the slightest neglect or failure of duty on his part. Hence if he neglect to have the landing in a complete state of repair for the reception of travellers, if proper and safe easements are not furnished for entering the boat, if from the narrowness or shortness of the boat, the want of necessary railing or any other like deficiency, a loss be occasioned, I am decidedly of opinion that no excuse should screen

him from his liability. [So, if there be wanting fastenings to keep the boat in a firm and steady position for the reception of passengers, cattle, carriages, &c. as was the case in the instance before us, he is liable. As the commander of his vessel, and the keeper of the ferry by public authority, as well as from the liability which attaches for losses, he is to have the sole and entire direction and management of the boat ; he may or may not at his election and pleasure constitute passengers his agents. They are to be so considered in every instance where they act discreetly and in subservience to his orders, but where wilful and in violation of his authority and directions should a loss happen from such cause, he is not liable. Decisions of our courts have identified him with common carriers, and in a general point of view correctly. But regard must still be paid to the nature of the employment, and I deem it altogether impossible in any one or more cases to establish a principle so correct in itself, as to suit every other case which may arise from different causes, and of endless variety. Every general rule must have its exceptions, and the case of a ferryman who has to contend with wind and water, the caprice and obstinate perverseness of some passengers, and the unruly and altogether unmanageable dispositions of some animals, to which I will add, the casualties incident to every station and situation in life, will necessarily furnish many, which can only be correctly adjudicated when such cases shall occur.

Mr. Justice *Nott* dissenting, delivered his opinion.

I concur in the view which has been taken of this case by my brother *Gantt* ; and if the case had been submitted to the jury as involving only a question of due diligence or neglect on the part of the ferryman, I should have been satisfied with the verdict. But I do not think he can be liable in the capacity of a common carrier, until the goods are actually on board of his boat ; and as I am of opinion the law was not correctly stated to the jury in that respect. I think a new trial ought to be granted.

THOS. SMITH, EXR. vs. WILLIAM D. HUNT.

Although the whole confession must be received and not garbled, yet the jury are not bound to give implicit faith to the whole or any part. Confessions are received just as other evidence, to be considered and weighed, and thereupon to be credited or discredited according to the character, interest and appearances, &c. of the party confessing. (*Arthur vs. Wells*, 2 Const. Rep. 314. *Maxwell vs. Carruth*.)



BARELLI, TORRE & CO. vs. BROWN & MOSES.

The liquidation of an account by a note, though it should have been by the note of a third person, unless expressly received in payment, does not destroy the open account.

Interest has been too often allowed upon a balance of accounts, after it has been acknowledged, to be now disputed.

Interest may be recovered upon account for money had and received; and in all cases of certain or liquidated damages.

Tried before Judge *Richardson*, Charleston, October, 1820.

ONE count in the declaration set forth, that whereas heretofore in consideration that the said *Barelli, Torre & Co.* would deliver to the said *Brown & Moses*, divers goods, wares, &c. of great value, to wit, of the value of \$35,000, to be sold and disposed of by the said *Brown & Moses*, for and on account of the said *Barelli, Torre & Co.* for reasonable reward to them the said *Brown & Moses*, vendue masters, in that behalf, they the said *Brown & Moses* undertook to sell the said goods, wares and merchandize as vendue masters as aforesaid, and to render a true and just account of the sale whenever afterwards they should be required; and although the said *Barelli, Torre & Co.* confiding in the said promises of the said *Brown & Moses*, did deliver the said goods; and the said *Brown & Moses* did sell and dispose of said goods for and on account of the said *Barelli, Torre & Co.* for divers large sums of money, of which a balance of \$1866 86, remaining due on the 27th April, 1819, yet the said *Brown & Moses*

have refused and still do refuse to render a just account, &c.

2nd. Count, for money lent and advanced, and also money had and received, by *Brown & Moses*, as auctioneers.

The plaintiffs moved to take this case up under the vendue act.

The defendants objected; insisting that it did not appear on the face of the proceedings that this was an auction debt; which objection was overruled.

Laffitian swore, that he was clerk of *Barelli, Torre & Co.* he proved the account filed; and that on a general balance there was due from *Brown & Moses*, \$1,266, exclusive of interest.

The defendants here objected, that no special agreement was proved; and moved that the plaintiffs should be nonsuited.

This motion his honor overruled.

The defendant then called *Cherry Moise*, a clerk in the house of *Brown & Moses*, who proved, that a certain parcel of goods, which were charged against the defendants in the accounts filed, were sold in the house of *Barelli, Torre & Co.* on a credit of four months; that the terms of sale were fixed by the plaintiffs themselves; that at this sale *Henry Lazarus* became a purchaser to the amount of \$1,100, for which he gave his note at four months, agreeably to the terms of sale, with one *Pollock* as indorser; that both *Pollock* and *Lazarus* were then in good credit, but plaintiffs refused to accept this note; upon which *Brown* and *Moses* gave their own note to the plaintiffs for that amount. Before the note of *Lazarus* became due, he and *Pollock* failed, and no payment had been received for these goods by *Brown* and *Moses*. The goods purchased by *Lazarus* were charged against the defendants in the accounts filed.

The plaintiffs then called *Laffitian* again, who deposed that as *Barelli, Torre & Co.* were valuable customers to *Brown* and *Moses*, they had some privileges more than ordinary as to the accepting or refusing of notes taken for

goods sold for them; and this privilege they exercised in rejecting the note of *Lazarus*. He further said, that the note of *Brown* and *Moses* had been settled; that at this settlement, *Moses*, one of the defendants, admitted the balance of \$1866 to be due, and gave his own notes for the same, which notes he produced in court; that afterwards \$600 were paid, reducing the sum to \$1266, the sum now claimed.

Upon examining the accounts filed, it appeared that the defendants were charged with \$1,100 the amount of *Lazarus's* purchase, but not allowed the payment of the same sum; which shows that the settlement of the note given by *Brown* and *Moses* for *Lazarus's* purchase, was nothing more than this, that the plaintiffs had given up that note to *Moses* and taken his note in stead.

The defendants then objected, that so far as regarded the goods sold to *Lazarus*, the defendants were not liable under the vendue act; and that plaintiffs ought not to recover in the mode prescribed by that act, the amount of those goods which were included in the general balance.

But this motion also was rejected; and the jury were directed to find for the plaintiffs, the sum appearing due on the general balance, with interest.

The jury found for the plaintiffs \$1266, with interest from — accordingly.

The defendants moved for a new trial upon the grounds,

1st. That the case ought not to have been taken up under the vendue act; *unless it had appeared on the face of the proceedings to be a case within that act.* That this action does not appear on the face of the proceedings to be within that act; because there is no averment that the defendants are auctioneers; nor is it laid that they undertook as auctioneers.

2d. That it is not competent for the plaintiffs to mix transactions falling within the class of vendue debts with other transactions, to which the peculiar provisions concerning vendue debts do not apply. But the liability of

the defendants to answer for the goods purchased by *Lazarus* is not such a debt as the vendue act provides for.

3d. That if the plaintiffs have received satisfaction for the goods purchased by *Lazarus*, then as the defendants are not allowed for such payment in the accounts filed, the general balance for which the plaintiffs have obtained a verdict is erroneous, and the plaintiffs have recovered more by \$1,100, than they are entitled to. But if it be admitted as the truth is, that those goods have not been paid for otherwise than by the note of *Brown & Moses*, for which the notes of *Moses* were afterwards substituted; then it is submitted, the liability of the defendants to answer for those goods is altogether distinct from that sort of debts to which the provisions of the vendue act apply.

4th. That the responsibility of the defendants for the goods purchased by *Lazarus* is created by their note, and ought not to be carried beyond it.

5th. That upon the evidence *Brown* is no longer liable for the goods purchased by *Lazarus*, either under the vendue act or otherwise, and so the plaintiffs ought to have been non-suited.

6th. That the plaintiffs have not supported their declaration, having declared on a special agreement, and having proved no more than a general *indebitatus assumpsit*, and so ought to have been non-suited.

7th. That the plaintiffs should not have recovered interest in this case; for even if interest be allowed upon an acknowledged balance, as in this case, the plaintiffs to entitle themselves thereto, should have declared upon an *insimul computasset*, or at all events for money had and received.

8th. That the acknowledgment of the general balance on which the plaintiffs in this case recovered, was improperly given in evidence; because that evidence was admitted to prove a debt liquidated, but in fact the debt was liquidated by the note of *Moses*, given at the time of that acknowledgment; and as plaintiffs did not choose to pro-

ceed on those notes they had waived the advantage of them, and ought not to recover a sum liquidated.

9th. Because the verdict of the jury is in other respects contrary to law and evidence.

Mr. Justice *Richardson* delivered the opinion of the court.

This case is very simple in itself. The witness proved a balance acknowledged by one of the defendants of \$1866, and that \$600 had been paid afterwards; whereupon the jury gave a verdict for \$1266, and interest from the acknowledgment. All the rest of the evidence served only to entangle the case, and to bring out the many grounds suggested in the brief; all of which are answered by well established principles. The decision in the case of *Roche-blanche vs. Cleary and Gieu*, declares that any finding by the jury that the claim of the plaintiff was or was not a vendue debt is altogether superfluous; as the question whether it originated in a vendue transaction need not be decided before the defendant shall have attempted to take the benefit of the insolvent debtors act, upon which attempt alone, it becomes important to inquire into the origin of the debt. After this decision, and under the general issue which was the plea filed in the case before us, the verdict could not be altered by reason of the claims of the plaintiffs being mixed up with a vendue transaction; nor even were they altogether of another character, could it avail the defendants any thing for the present, after pleading to the merits. For in either of those cases the only question would be, whether the case must be taken up out of the usual order, according to the act of 1815; and any objection arising out of the origin of the debt, as not being a vendue case, should be brought to the observation of the court by the claim of an imparlance or some special plea or motion to continue, or at least not by a general denial of the debt; because upon such an objection the only object would be to decide whether the case was to be taken up, and not whether the defendants might afterwards obtain

the benefits of the insolvent debtors act. It is competent to join a vendue debt with any other debt, if they are consistent in themselves, i. e. may be covered by the *same plea and judgment*, though the mixture may delay the recovery of the vendue debt, perhaps.

These observations sufficiently answer the objections to the verdict contained in the three first grounds, as arising out of the plaintiffs account, being in the whole or in part a vendue transaction. I give no opinion on what was their true character, or whether they were mixed or not, or what may be the future consequence in either case. But under the issue made up, and for the present, the only important enquiry is, did the allegations and proofs justify the verdict, independent of the peculiar character or origin of the debt? Since the decision in *Rocheblanche vs. Cleary and Gieu*, the only object that I can perceive in stating that the claim arose out of a vendue transaction or in enquiring into that fact is, that the case may be taken up, *prima facie*, under the act of 1815, in a summary way.

The 5th, 6th and 9th grounds, appear to be predicated upon the supposition, that as *Moses* gave his notes to the plaintiffs for the balance acknowledged to be due, neither of the defendants (but more especially *Brown*) could be made liable upon the account acknowledged. But it is settled that the liquidation of an account by a note, though it should have been by the note of a third person, unless expressly received in payment, does not destroy the open account, (5 *Johns.* 72-73. 8 *Johns.* 389.) The plaintiffs were then at liberty to sue *Moses* upon his notes, or both defendants upon the original account. And as to the note of \$1100, given for *Lazarus*, either of the defendants was at liberty to regard the consideration of that note as a part of the general account of the plaintiffs, and to strike the balance as if no such note existed. The result is precisely the same, whether the note of \$1100, be charged to the defendants, or the amount of goods, i. e. \$1100, which was the consideration of the note. The parties might adopt either form in order to shew the true balance

due, and *Moses* having adopted the latter, his act is binding upon *Brown*. I mean not to say that the manner of casting the account made the note of \$1100 a vendue debt, if not of that character before. I repeat that for the present, the enquiry is, was the account proved, not whether it originated in a vendue transaction, nor whether the acknowledgment by *Moses* made it so.

The 7th and 8th grounds of the brief remain to be considered.

1st. Was the declaration in due form? The second count was "for money had and received," and the account filed was for divers sums of money received by the defendants for the plaintiffs, upon which a balance was due and had been expressly acknowledged. Could there then be a case more peculiarly proper for such a count, which *Chitty*, (p. 341,) says, is the proper form where money has been received, or which, *ex equo et bono*, ought to be paid over to the plaintiffs.

Lastly, ought interest to have been allowed upon the balance due, and in this form of action? Interest has been too often allowed upon a balance of accounts, *after it has been acknowledged*, to be now disputed. (*Robinson vs. Bland*, 2 Burr. 1086. 2 Bro. 662. *Blaney vs. Hendricks*, 3 Wils. 205. 2 Blak. 761. 1 Doug. 376. See the collection of cases, by *Day*, in 5 *Espi. Rep.* 114.

In the case of *Bulow vs. Godard*, (1 Nott & M'Cord, 45,) this court considered the subject with great attention, reviewing past adjudications in detail, and appear to have come to this conclusion, "that interest is recoverable in all cases of certain or liquidated damages." The same case also decides that interest may be recovered upon a count for money had and received; (See also *Pean vs. Barber*, 3 *Caines* 266. 9 *Johns.* 71. *Lawes on Asst.* 488.

The motion is therefore dismissed.

Justices Colcock, Huger and Gantt, concurred.

JOHN F. LAWSON, BY HIS GUARDIAN MISS E. DANFORD,
VS. SAMUEL PERDRIAUX AND WIFE, GUARDIAN OF THE
LATE FRANCIS LAWSON.

Where the intestate left a mother, and brother of the *half blood*, the Court *Held*, that the brother of the *half blood* was not entitled to a distributive share, as a brother or sister of the *whole blood*, under the act of 1797, but that the mother was entitled to the whole estate.

Tried April Term, 1821, at Georgetown, before Mr. Justice Richardson. Petition for summons in partition.

THE plaintiff, a minor, was the half brother of *Francis Lawson*, deceased. Mrs. *Perdriaux* was the mother and guardian of the deceased. He left stock amounting to \$7,700 at the time of his death in possession of his mother and guardian. The question was, whether the mother should take the whole of his estate as his only heir, or whether the petitioner, his half brother, should have half?

The petitioner claimed under the act of 1797, (1 *Brev. Dig.* 426. 2 *Faust* 146,) amendatory of the act of distributions of 1791.

It was objected that he was of the *half blood*, and replied that the statute of 1797, embraced the half as well as the whole blood, and that in this case, there being none of the whole blood to interfere with the half blood, and the legislature by the act of 1797, having provided that where there was a brother, the mother should not have all the estate, the half blood was entitled to share with her.

The judge decided in favour of the mother, and against the half blood.

A motion was made to reverse that decision as contrary to law.

Mr. Justice *Richardson* delivered the opinion of the court.

By the act for the abolition of the rights of primogeniture, passed in 1791, brothers and sisters of the *half blood* are excluded from the estate of the intestate, who has left also a brother or sister of the whole blood. And brothers

and sisters of the *whole blood*, are in like manner excluded, when the intestate leaves a father or mother. By the same act, the issue of a brother or sister of the half blood can take only under the general provision for the "next of kin," and not by representation. By the act of 1791 then, the mother of the intestate *Francis Lawson*, would have taken the whole estate, even if the intestate had left a brother or sister of whole blood; and a brother or sister of the whole blood, had there been no parent surviving, would have taken the whole in exclusion of brothers and sisters of the half blood. Thus stood the act of 1791, when the act of 1797, sets forth, "Whereas it has been adjudged by the courts upon the construction of the aforesaid act, (act of 1791,) that in cases in which persons die intestate, leaving no wife nor children, &c. but leaving father or mother, although such intestate leave brothers and sisters, &c. that the father or mother is entitled to receive the whole estate, &c. Be it enacted, that, &c.—in all cases in which persons shall die intestate, leaving neither wife, child or children, &c.—but leaving a father or mother and brothers and sisters, &c.—one or more, that the estate, &c. shall be equally divided amongst the father, or, if he be dead, the mother and such brothers and sisters as may be living at the time of the death of such intestate, &c.—*Provided* always, that the issue, if any, of any deceased brother or sister, if more than one, shall take among themselves, the same share which their father or mother, if living, would have taken," &c. (1 *Faust* 29. 1 *Brev. Dig.* 425.)

Now what is the evil complained of? Not surely that parents took in exclusion of brothers and sisters of the half blood, for these were postponed not only to parents, but to brothers and sisters of the whole blood, and were ranked only with the issue of such brothers or sisters. Two distinct classes of kindred, i. e. (1) parents, (2) brothers and sisters of the whole blood, stood, not together, but in succession, to exclude brothers and sisters of the half blood, under the act of 1791. It would seem then that the evil complained of was, that parents took in exclusion of bro-

thers and sisters of the whole blood, and it follows that the amendment desired was, that parents should no longer take in exclusion of them. In construing then the act of 1797, which is called an act to amend, &c. we are to limit the construction by the amendment desired, so as to render the remedy introduced adequate to the evil complained of; but not more than adequate, unless the terms used plainly require a more comprehensive interpretation. The terms used are "brothers and sisters." Brother is defined by *Johnson*, "one born of the same father and mother;" and sister, "one born of the same parents," "correlative to brother," (see Folio Edition of 1819.) Though, doubtless, those terms may, in many instances, have a much more comprehensive signification. The strict import of the words used conspires then with the apparent object which led to the act of 1797, to confine the meaning of brothers and sisters to those of the whole blood. Again, an act to amend, &c. should not be construed to alter the rules laid down in the primary act, except so far as is plainly required. Now the act of 1791, not only gives the whole estate to the brothers and sisters of the whole blood in exclusion of those of the half blood, and to parents in exclusion of both, but confines the right of taking by representation among collateral kindred, to the issue of brothers and sisters of the whole blood. But if in the act of 1797, "brothers and sisters" comprehend both those of the whole and half blood, then not only would brothers of the whole and half blood and parents be placed upon the same footing, and constitute but one class instead of three, but by the proviso quoted, the issue of the brother of the half blood would be made to take by representation or *per stirpes*, equally with the issue of the brother of the whole blood. Such a change of the rules of the act of 1791, should be imperatively ordered before being adopted; else we might by construction introduce new principles into that act, which is to be regarded as the context of the act of 1797, and with which, the latter should be rendered consistent, wherever it does not expressly amend

or alter the former. As in the interpretation of an act to *amend* another, we are to look back to the *former* act, as the context, so in all acts of questionable import, we are to regard the principles of the common law, upon which the laws being bottomed, those principles form the context of all our acts, and aid us in the inspection of a difficult point, not only with a light generally diffused through the whole system of jurisprudence, but, by leading us with authority wherever the written law is deficient or uncertain. Now the act of 1791, lays down its rules expressly for the distribution of *real estates*, and directs *personal* property to be distributed in the same way. And by the canons of the common law for the descent of real estate, a brother of the half blood could not take. Wherever then, in the rules for the descent or distribution of real estate, the word brother is used in an uncertain sense, it should by analogy to the meaning of the same word in those canons be construed brother of the whole blood. It should be marked that those canons are even now of force, except as far as they have been altered, or have become inapplicable; and it is vain to oppose to such authority the rules of civil law, or the interpretation of the English statutes of distributions. These may afford general intelligence, but we would look to them in vain for a ray of authority. Indeed the former act of distributions which places brothers of the whole and half blood upon the same footing having been expressly altered in this respect, forms an example to deter rather than to lead us; for the principle, which, after trial, has been laid aside by the legislature, becomes *emphatically illegitimate*. The brother of the half blood is therefore by no construction to be placed upon a footing with those of the whole blood. It may be said, that in the case before us, there is no contest between the whole and half blood, and no issue of the half blood appear to take *per stirpes*. But if brothers and sisters can by the act of 1797, in any instance, mean those of the half blood, the signification must be invariably the same in all cases. In a word, the claims of litigants must in themselves be suited

to the act, and come within its provisions, or they remain without it; for the act has no elastic power to dilate and contract its letter or meaning for the accommodation of an unfortunate case. The words must have one meaning in all cases. To these arguments drawn from the strict import of the words brothers and sisters, from the plain rules of the act of 1791, from the cause which introduced the amendment of 1797, and from analogy to the canons of descent, it only remains to add the decision of three judges of the court of equity against two in the case of *Wren and Wife vs. Carnes and others*, (4 Equity Rep. 405.)

The motion is refused.

Justices *Bay*, *Huger*, and *Gantt*, concurred.

Mr. Justice *Colcock*, dissented.

CONSTITUTIONAL COURT

OF

South-Carolina, November Term, 1821—Columbia.

JUSTICES PRESENT AT THIS TERM,

ABRAHAM NOTT,	RICHARD GANTT,
CHS. J. COLCOCK.	DAVID JOHNSON,
DANIEL E. HUGER,	JOHN S. RICHARDSON.

WILLIAM GREGG vs. JOSEPH W. SUMMERS.

Under our act avoiding the service of all process served on any person, at any muster, or other time where such person shall be obliged to bear arms in the militia, or in going to or returning from any muster or place of rendezvous, or within twenty-four hours after such persons being discharged from such service, includes as well *bail writs* as any other process.

It *seems* though that a writ may be served, on such day, by leaving a copy at the most notorious place of the defendants abode, under the act of assembly.

Motion to reverse the circuit decision in this case. Tried before his honor Judge *Colcock*.

THIS was a motion made by *Bauskett* and *Dunlap*, for the defendant, before his honor Judge *Colcock*, to set aside the service of a writ which did not require bail, and had been served on the defendant on a muster day by the sheriff of Newberry district. The motion was as follows,

“It appearing to the satisfaction of the court that the writ in this case was served on the defendant while on militia duty, therefore *ordered*, that the said service be set aside.”

The presiding Judge granted the motion. From which decision the plaintiff appealed, and gave notice that he would move the Constitutional Court at their next sitting to reverse this decision of the circuit Judge on the following grounds, to wit,

1st. That the word *process*, used in the act of the general assembly on this subject, *means only such process as requires bail*, and that cases in which no bail are required, are not included.

2dly. That it is the intention of the act to enable those who are subjected to militia duty, to discharge it promptly and punctually in their proper persons without proxy, and without being under the inconvenience of their ordinary liability to personal arrests and corporeal confinement; and therefore that this decision was contrary to the law.

Mr. Justice *Colecock* delivered the opinion of the court.

By the 17th section of the act of 1794, for organizing the militia of the state, (*Miller's Militia Law* 18,) it is enacted, "That no civil officer whatsoever shall on any pretence, execute *any process*, (unless for treason, felony, or breach of the peace,) on any person whatsoever, at any muster or other time when such person shall be obliged to bear arms in pursuance of this act, nor in going to or returning from any muster or place of rendezvous, or within twenty-four hours after such person shall be discharged from appearing in the regiment, company or troop to which he shall belong, under the penalty of five pounds sterling; and the *service* of any *such process* shall be void to all intents and purposes whatsoever."

It is somewhat surprizing how any doubt could have arisen after the reading the words of the act, which are certainly as explicite as any known to our language. "No civil officer whatsoever," (which words certainly embrace a sheriff and his deputies,) "shall, on any pretence execute *any process*," (a writ is a process, and therefore embraced in the term *any process*,) "except for treason, felony or breach of the peace," (and it is not in the exception,) "or any person whatsoever at *any muster*," (embracing the case of this defendant who was at muster and actually on duty,) concluding with the words "the service of any such process shall be void." It is sufficient to shew that the case is embraced in the words of the act, but the words

of the act as well as its spirit shew that the views which the plaintiffs council had taken of the act is incorrect. He says the object of the law was to secure the performance of the duty and only intended to protect the person from imprisonment during the time the service is performing. But if this were the case why extend the protection to him on his return and for twenty four hours after. The act intended not only to protect the person but the feelings of the individual while in the performance of this duty, to free him from all the embarrassments of civil concerns while engaged in the performance of his military duties. The service of a process even for the recovery of an ordinary debt, is a circumstance calculated to excite unpleasant feelings in the bosom of a man of correct principles, and the more so if it should occur at a moment when he is performing a public duty in the presence of his fellow citizens. Suppose a sheriff stepping up to an officer as he was about to give the word of command to his regiment or brigade, and put a writ into his hand? would not this be humiliating to his pride? or even in a more stoical view of the subject, is it not an impediment and hindrance in the discharge of his duty which he ought not to be subjected to? Or in the case of a private at the moment he is about to shoulder his musket in obedience to the command of his officer, to be compelled to receive a writ from a sheriff; would it not both wound his feelings and embarrass him in the discharge of his duty? It is the duty of a wise legislature in subjecting the citizens of the country to the regulations of the law, to have a due regard to those honorable feelings which should be inculcated in the bosom of freemen, and this was the object of our legislature. *A writ may be served by being left at the most notorious place of defendants abode.*

The motion is discharged.

Justices Nott, Huger, Gantt and Johnson, concurred.

J. J. Caldwell, for the motion.

Bauskett and Dunlap, contra.

JOSEPH SMITH vs. JAMES HUNT.

A Sheriff must be proceeded against by process, as other persons, in order to make him a party in court.

Tried at Spartanburgh, Fall Term, 1821, before Mr. Justice *Gantt*.

THE plaintiff had sued out a writ against the defendant, who then was and still is the sheriff of Spartanburgh district, and this was an application to the court for leave to file his declaration after the lapse of more than a year and day from the time the writ was lodged in the coroners office, which was rejected; and the application was now renewed in the form of an appeal from that decision, on the ground, that the defendant, being an officer of court, and consequently in contemplation of law always in court, the plaintiff had a right to file his declaration at any time without process to bring him in.

Mr. Justice *Johnson* delivered the opinion of the court.

It is said, and I believe on good authority, that this application is in accordance with the practice of the English courts. The answer is that the practice in this state has been invariably and immemorially to make an officer of court a party by process. I have not seen nor do I believe that any inconvenience has resulted from it, and do not therefore think that it ought to be abandoned for another, although it might be equally practicable and convenient.

The motion is refused.

Justices *Huger*, *Colcock* and *Nott*, concurred.

Farnandis, for the motion.

S. Foster, contra.

WALTER O. BECKLEY vs. WM. MOORE, Do. vs. SCOTT.

The general rule is that no plea shall state two or more facts, either of which would of itself, independently of the others, constitute a suf

ficient ground of defence ; but the defendant is not precluded from introducing several matters into the same plea, if they constitute parts of the same entire defence, and form one connected proposition.

But where to debt on a sealed instrument, payable to the plaintiff or bearer, was pleaded *solvit post diem* " to one *J. Newby* who was the bearer of the said writing obligatory," the Court *Held* that though it would not pronounce the plea bad for informality, yet there being no necessity for any thing more than a general plea of payment, to discountenance prolixity, so much should be stricken out as alleged payment to *Newby*.

Tried before Mr. Justice *Gantt*, at Abbeville, Fall Term, 1821.

THIS was an action of debt on a sealed note payable to the plaintiff or bearer, to which the defendant pleaded *solvit post diem* " to one *John N. Newby*, who was then the bearer of the said writing obligatory.

A motion was made in the circuit court to strike out this plea, on the ground that the defendant should have pleaded payment generally, and not payment to *John N. Newby*, and that his plea was therefore irregular and informal.

The motion was refused by the court below, and was now renewed as an appeal from that decision.

Mr. Justice *Johnson*, delivered the opinion the court.

The general rule is that no plea should state two or more facts either of which would of itself independently of the other constitute a sufficient ground of defence, (1 *Chitty On Pleading* 230;) but the defendant is not precluded from introducing several matters into the same plea, if they constitute parts of the same entire defence and form one connected proposition, (2 *Johnson* 432. *Ibid.* 462.) And under this modification it would seem that the defendant might state the time, the place, the manner and all the circumstances attending the payment, so as all connected would lead to that result. But I do not see the necessity of such a plea, nor the benefit that would result to the defendant from it, but on the contrary a possible prejudice ;

as he would be confined to the particular facts stated : and although I am not prepared to pronounce such a plea bad, it is at best useless and ought therefore to be discountenanced.

In this case I cannot discover what possible benefit will result to the plaintiff from his motion, as by the general replication, that the defendant had not paid *modo et forma* the fact of payment, and the authority of *Newby* to receive would be put in issue : Nor can I, on the other hand, conceive what injury would result to the defendant if so much of his plea was stricken out ; as under the general averment of payment, he might give in evidence a payment to any person authorized to receive. It is of some importance however that the greatest simplicity should be observed in pleading, and that any thing leading to prolixity or duplicity should be discouraged as much as possible. I am therefore of opinion that the plaintiff's motion should be granted so far as relates to the allegation that the payment was made to *Newby*.

Justices *Nott* and *Huger* concurred.

Bowie, for the motion.

McCraven, contra.

CORNWELL vs. BICKLEY.

Where the subscribing witnesses to a deed were without the state, their signatures must be proved, before the deed can be admitted in evidence, although it should be proved that the signing of the deed was in the hand writing of the vendor.

The plaintiff in trespass to try titles can not maintain his action unless he prove an actual trespass.

ADMINISTRATORS OF WALLACE vs. JOHN TALBOT, ADMINISTRATOR OF WEST COOK.

In cases of eviction the price of the land and interest from the time of the purchase shall be the measure of damages ; but where the loss is only partial, the party evicted may shew that the part of the land lost is more valuable than the rest, and claim a compensation adequate to

the loss; i. e. the relative value and not the average price is the measure of damages. (a.)

Edgefield district, Fall Term, 1821. Tried before Mr. Justice Colcock.

THIS case (or rather the point in it,) was submitted to the court by the counsel on both side on the facts as contained in the notes of the plaintiff's counsel; by which it appears that the action was brought on a warranty in a deed conveying a tract of land to *John Wallace*, executed by *West Cook*, on the 3d February, 1804, for 710 acres of land. *Wallace* was sued by one *Williams*, and lost 220 acres of the land, thus sold to him by *Cook*. The land thus lost was valued by some of the witnesses at \$2 50 per acre, by others at \$1 50. There was a mill on the land, and the timber land was therefore more valuable than that which was cleared, or that which did not furnish such timber as might be used for sawing. Good timber was scarce on the land. The land lost furnished some of the best timber. The price paid for the land was \$2500.

The jury found a verdict for the plaintiff, for the 220 acres lost, at \$2 50 cents per acre, and gave interest on that amount, from 1st January, 1808, which was the time of eviction.

A motion was now made to set aside the verdict, and for a new trial on the ground (as stated in the brief) that the jury allowed interest on the value of the land.

Mr. Justice Colcock delivered the opinion of the court.

The jury were certainly authorized to allow interest on the value which they fixed on the land. But it is understood that the defendants counsel mean that having allowed a greater value (per acre,) than was given for the land, that therefore they had no right to give interest, and that they were bound to have allowed only a *pro rata* valuation of the land. The rule which has been laid down by this court, is that *in cases of eviction the price of the land and interest from the time of the purchase shall be the mea-*

sure of damages. But where the loss is only partial, it is not intended to prohibit the party evicted from shewing that that part of the land lost is more valuable than the rest, and claiming a compensation adequate to the loss. Thus if one should purchase 100 acres of land at \$1000, 20 of which should be of the most valuable low ground and the other 80 pine land, and the 20 acres should be taken away by one who had a better title, would it be a just measure of compensation to allow \$200 for the 20 acres lost? Could it be imagined that this was the mode of determining the value of the land, resorted to by the contracting parties when they entered into the contract? This may be considered as an extreme case; yet between this and a case in which each acre should be alike valuable, there is such a diversity of cases distinguishable by slight shades of difference, that it must always be a matter of consideration for the jury. The jury then had a right to value the land at \$2 50 per acre, and have not violated any rule in giving interest on that sum from 1808.

But the defendant can not complain. If the verdict of the jury had been on the principle he contends for, the amount would have been much greater. Take the value of the land at the time of purchase, and calculate the interest from that time. The price paid was about \$3 21, which would make about \$642; add to this 18 years interest and the costs of the former suit, and the amount will be much greater than the verdict.

The motion is discharged.

Justices *Nott, Gantt, Huger, Richardson* and *Johnson*, concurred.

Davis, for the motion.

Simkins, contra.

(*a.*) See *Pray vs. Briggs*, (2 *Nott* and *McCord* 184,) *Furman vs. Elmore*, (*Do.* 189,) And see 2 *Wharton* 62, note C. and 6 *Do.* 118, *Hopkins vs. Lee*. In the case of *Macky vs. Collins*, (2 *Nott* and *McCord* 186) the Court *Held* that the plaintiff might recover for breach of covenant, on a warranty against all lawfully claiming, before eviction, by showing a paramount title in a third person.

R. /

C. CLIFTON vs. Z. PHILLIPS.

In an action on the case in the nature of an action for ravishment of ward to try the freedom of a negro, where the jury found a verdict establishing the right of the plaintiff's ward to freedom, but found no damages, the Court Held that the plaintiff was entitled to costs.

Tried at Richland, Fall Term, 1821, before Mr. Justice Colcock.

THIS was an action on the case in nature of an action for ravishment of ward, to try the question whether a negro the ward of plaintiff, held in slavery by the defendant, was or was not entitled to his freedom. The jury found a verdict establishing the right of plaintiff's ward to freedom, but found no damages, and the question now submitted to the court is whether the plaintiff is entitled to costs?

Mr. Justice Johnson delivered the opinion of the court.

Costs were not allowed by the common law, and most of the acts giving them have fixed the amount which the plaintiff must recover to entitle him to them; and these limitations were obviously intended to discourage frivolous and paltry actions, and I think the court ought not to construe them too rigidly when the action (as in this case) was necessary to effect an important object. Applying therefore a liberal construction to the act on which this proceeding is founded, and which gives costs, it appears to me that the costs are not made to depend solely on the damages but on the verdict. The verdict in this case was for plaintiff, and under this construction I think him entitled to costs.

Justices Nott, Huger, Gantt and Richardson, concurred.

Stark, for the motion.

Clifton, contra.

JOSEPH SHELTON *ads.* EXR'S OF THOS. GARRY.

To an action upon a note, to which *non assumpsit* was pleaded, the defendant may prove that it was given for a tract of land, the lines and boundaries of which were *fraudulently* misrepresented by the vendor.

Tried before Mr. Justice Gantt, Laurens, 1821.

THIS was an action on a note, and the defence set up was, that the note had been given for part of the purchase money of a tract of land conveyed by the plaintiff's testator to the defendant, and that the testator when he sold the land, pointed out certain lines as the boundaries, when in fact, his lines were not as represented; and it was alledged that twenty five acres of the land did not belong to the testator, and that this fact was known to the testator. The defendant offered evidence to support this defence to the extent of a wilful fraud in the testator in misrepresenting the true lines of the land in question; but the Judge rejected the testimony so offered, as inadmissible, to controvert the terms of the conveyance, under the plea of the general issue. Whereupon the jury found a verdict for the amount of the note.

The defendant appeared and moved the Constitutional Court for a new trial on the ground, That the evidence offered was admissible and ought to have been heard.

Mr. Justice *Richardson* delivered the opinion of the court.

The question made resolves itself into this enquiry, Can fraud be proved under the general issue, in order to destroy a contract not under seal? It is not left for us, to determine whether fraud will vitiate a contract. Fraud destroys any contract. It is equally clear too, that whatever goes to shew that the contract was originally void, is competent testimony under the general issue: and even a deed which is a mode of contracting, if originally void, may be set aside as well as a contract evidenced in any other form. A moral fraud then, the end of which is to shew that there never was any binding contract, because the

fraud infects and destroys it *ab initio*, and which has the same effect, i. e. *to destroy*, though the contract be covered collaterally by a deed of conveyance and entrenched behind a seal, need not be specially pleaded.

But I need not go farther than the case requires. The action is assumpsit on a note; and that fraud may be proved under the general issue to such an action, is clear; (See 1 *Chitty*, 470.) The testimony then should have been heard; even admitting that the conveyance for the land might have been replied successfully to the fraud; for it must be noticed that both the testimony, *viva voce* of fraud, and the conveyance, were matters of evidence, extrinsic and collateral to the action. And although one part of the defence, which is competent in itself, be destined to counteract another part, (a disappointment by no means uncommon,) yet all the evidence is to be heard and weighed. Without deciding then between the evidence of fraud which was excluded and the force of the conveyance, the former ought to have been heard; if it be admitted that fraud may be proved under *non assumpsit*, as surely it may be. Then how else was the defendant to bring out his defence? Should he be required to set out and expose his intended evidence, i. e. the conveyance, and then to reply a fraud in avoidance of the deed adduced? Surely not. Suppose the action were assumpsit for the price of a horse, and the plea *non assumpsit*, a fraud committed by the vendor in the sale of the horse might no doubt be proved. But suppose in the same case that a part of the evidence of the defendant consisted of a bill of sale under seal, and adduced in order to identify the horse and thus shew the consideration, could the adduction of such bill of sale estop the defendant from shewing the fraud *ex aliunde*? Surely not. Were the defendant to be thus estopped by the necessary adduction of a deed, the moment he produced a bill of sale under seal, which is so common, in order to shew the consideration of a note given, that moment there would be an end of the defence. The mistake appears to me to arise from

confounding the conveyance with the gist of the action now before us. But the gist is the promise of a debt evidenced not by the conveyance, but by the note, and the conveyance is the defendants testimonial under the hand of the plaintiff of what thing was the consideration of the note; and after having by the conveyance pointed out the matter which was the subject of the fraud, it remained to prove the fraud *ex aliunde*. There is no more inconsistency in this course, than in the common one of adducing a deed to point out the consideration of a note, and then to prove that consideration to have no existence in truth. The deed could be no estoppel in such a case.

There can be nothing in the conveyance to estop all further proof of turpitude, said to enter in the transaction which the conveyance records.

A new trial is therefore granted.

Justices *Huger* and *Nott*, concurred.

O'Neill and *Irby*, for the motion.

Simson and *Dunlap*, contra.

PHIL. E. PEARESON *vs.* CHARLES PICKET.

OATS *vs.* THE SAME.

Bail is allowable in slander. (*a.*)

In an affidavit to hold to bail in slander, the words spoken must be alleged to be *false*.

Tried at Fairfield district, Fall Term, 1821, before Mr.

Justice *Huger*.

Motion to reverse the decision of the Circuit Court.

THIS was a motion to discharge an order for bail, founded on the following affidavit: "Personally came *Phil. E. Peareson* and saith on oath, that he has been informed and believes, that *Charles Picket* has repeatedly slandered him by charging him with corruption in his office as an attorney," sworn to, &c. (In *Oats's* case, the affidavit ended, "by charging him with forgery and perjury.")

The clerk of the court gave an order for the sheriff to take bail in the sum of \$2500, and this motion was to discharge that order. The court refused the motion.

The defendant moved to reverse that decision, and that the bail be discharged on the following grounds :

1st. Because bail cannot be demanded in an action of slander.

2nd. Because the affidavit in this case was not sufficient to warrant the clerk in making the above order.

Mr. Justice *Richardson* delivered the opinion of the court.

The practice of ordering parties to be holden to bail upon a charge of slander, has been so general in South-Carolina, that it may be fairly considered either as a practical and received construction of the act of 1796, or else allowed upon general principles.

Whatever then may be the decisions found in the reports of adjudged cases in England or even in our sister states, our own practice probably growing out of the act before noticed, is to be respected. Especially too, when no reason can be presented why an injury inflicted by a malicious and false slander, may not be redressed in the same manner and to the same extent, as any other wanton mischief. Is reputation, often so dearly earned, so deeply regarded by honest men, and so beneficial in its example, to be so easily tarnished by malicious slander? Is it to be less protected than all the other earnings of man in society; and is this disregard of reputation to be exercised too in favour of a slanderer? While law is based upon reason, or regards consistency, or has for its end the protection of the citizens, our practice will ever be admitted to be bottomed upon true principles.

The second ground presents for the first time, a question of practice, i. e. must the affidavit to hold a defendant to bail state that the slander was false?

To determine this, we must reason from principle, analogy and convenience. Before the person of a free man can

be arrested, the charge against him should be manifest and not merely inferable. In practice too, affidavits to hold to bail whether in debt or for damages, have been always required to be so explicit and certain as that *if true*, the defendant must be liable; as for instance, that he "is justly indebted in a named sum or that he unlawfully assaulted and beat, &c." Now in the cases before us unless the slanderous words were false he is justifiable. The falsity of the slander then should be plainly averred. If such averments were not required, not only inconvenience but injustice would follow; for then any convict might arrest a person who conversed about his conviction and crime, and he might order such arrest without the fear of being punished for perjury, having only to charge that he had been slandered, &c. A reasonable and convenient restriction therefore, upon the power of holding to bail for slander, requires that the plaintiff should charge *that it is false in fact*.

The motion is therefore granted upon the second ground taken.

Justices Gantt, Huger, Nott and Colcock, concurred.

Williams, for the motion.

Gregg, contra.

(a.) See *Starkie on Slander*, 278. R.

THE EXR'S OF B. C. YANCY vs. THOS. W. TALLMAN.

It is a *courtesy* which one Judge owes to another not to rescind or suspend an order which the other has made. But a Judge at Chambers may rescind or suspend an order made by himself *sedente curia*.

By the act of 1818, a Judge at Chambers has the power "to grant writs of prohibition or *mandamus* and *quo warranto*, and to hear and determine motions to stay or set aside executions, in the same manner, in every respect, as if the court was actually sitting."

THIS was a rule on the sheriff of Abbeville district, to shew cause why an attachment should not be issued

against him for not paying over to the plaintiff, monies which it was supposed he had collected on an execution. The presiding judge, Mr. Justice *Gantt*, being of opinion that he had not shewed sufficient cause, ordered the rule to be made absolute against him.

Shortly after the adjournment of the court, it was discovered that the money had actually been paid to the former sheriff, and his receipt in full against the execution was produced.

A motion was then made before the same judge at Chambers, to suspend the order of attachment previously made. But being of opinion that a judge at Chambers had no right to suspend an order made *sedente curia*, he refused the motion.

This was an appeal from that decision, and for an order to discharge the attachment against the sheriff.

Mr. Justice *Nott* delivered the opinion of the court.

It appears to me, that with regard to all the cases over which a judge can exercise any controul during the recess of the courts, he must have as ample power as when sitting within the walls of a court house, or at least his power must be adequate to the remedy which the evil complained of requires. It is a courtesy which one judge owes to another, not to rescind or suspend an order which he has made. It would also lead to incalculable mischief, if a person might be indulged in renewing a motion before successive judges, until per chance he might prevail upon one to support a motion, which every other had refused. But when the circumstances of the case are changed, the reason of the rule ceases to exist; indeed it can never be urged, when the application is to the same judge who made the order. The necessity of the case now under consideration, would seem to sanction the authority required to be exercised. An officer of court is ordered to be imprisoned for the non performance of an act, which it was never his duty to have performed. The judge who made the order, is satisfied that it ought never to have

been made, and never would have made it, if the truth of the case had been known to him, and is satisfied it ought not now to be carried into effect. To hold that a judge under such circumstances cannot suspend the operation of such an order, merely because he is not sitting in court, would appear like ascribing the qualifications of a judge to the robes in which he is clad and the seat on which he happens to sit, rather than to his moral and intellectual attainments.

The act of 1818, gives to the judges at Chambers, the power "to grant writs of prohibition and *mandamus*, and of *quo warranto*, and to hear and determine motions to stay or set aside executions in the same manner in every respect as if the court was actually sitting."

Perhaps it is doubtful, whether the case now under consideration comes within the letter of the act. But it is certainly within the spirit of it. And from the liberal and extensive power therein conferred, I am satisfied that this may be inferred or must be presumed to have previously existed. It would be making the cobwebs of form stronger than the bands of justice to withhold relief in such a case. It is only when prompt and speedy justice is required, and where the opportunity is lost by delay, that a judge at Chambers is ever required to interfere. And being in favor of liberty, it was peculiarly proper and necessary that such discretion should be exercised in this case.

I am of opinion, that the judge at Chambers might have ordered a suspension of the attachment which he had before directed to be issued, and the motion therefore is now granted.

Justices *Huger* and *Johnson*, concurred.

Mr. Justice *Richardson* :

I dissent because the fact alleged for the motion, existed before the rule was made absolute by the judge in court.

Lomax, for the motion.

M^r Craven, contra.

JAMES HOOD vs. DAVID ARCHER, AND OTHERS.

A feme covert, cannot by her last will and testament, made with her husbands consent, bequeath her choses in action to him.

THE only question in this case, was whether a feme covert could by her last will and testament, made with her husbands consent, bequeath her choses in action to him?

Mr. Justice *Nott* delivered the opinion of the court.

In *Roberts on Wills*, 28, it is laid down that "a woman under coverture cannot make a will either of lands or of goods, not even of her *paraphernalia*, without her husbands consent, nor of her debts and choses in action, which are not divested out of her by the marriage, and do not survive to the husband." This inability arises from the well established principle of the common law, that her civil rights are merged in the husband. All her contracts are absolutely void. She can make no disposition of any of her property, either by deed, will or otherwise, (*Richardson* 35.) It is admitted that she may dispose of her choses in action with the consent of her husband, (2 *Atkins*, 49.) But that is, considered more in the nature of an appointment, to be carried into execution by the husband, than a testamentary bequest. And it derives its efficacy more from the consent of the husband than the will of the wife. It appears, however, that effect is frequently given to the testamentary dispositions of the wife, in the equity courts of England; as when the husband stipulates that certain personal property shall be enjoyed by the wife separately. In such cases it is held that it shall be enjoyed by her, with all its incidents, whereof the *jus disponendi* is one. And where she has this power over the principal, she must necessarily have it also over its produced accretions. But our court of equity has never recognized such a derivative form in a feme covert, as I have been informed by one of the members of that court. They consider a testamentary disposition of the wife, as deriving its whole support from the consent of the husband.

It has been contended in this case, that if a feme covert have a right to make a testamentary disposition of her property, she may give it to whom she pleases, and as well to her husband as to any body else. But that deduction does not follow. If her power to bequeath was derived alone from her right to hold property that would seem to be a correct inference. But if it is derived alone from the consent of the husband, then it must be so exercised as to furnish no ground of suspicion that she acted under the influence of his persuasion or coercion. Mr. Justice *Lawrence*, who delivered the opinion of the court in the case of *Scammel vs. Wilkinson*, (2 East. 555,) cites a passage from 4 Co. (61 b,) that the law of England will not allow of any custom that a feme covert may make any devise; for the presumption that the law has, that it will be made by the constraint of the husband." To which the same learned judge adds, "if this reason be applied to testaments she can make none, unless it be by the consent of the husband and to his prejudice; in which case a restraint cannot be presumed." I apprehend that the same reason does apply to testaments as to devises. The law so carefully protects the wife against the influence which the husband is supposed to exercise over her, that it even visits her crimes upon him, when committed in his presence; upon the presumption that she acted under his coercion. The power of a feme covert to bequeath is precisely the same as to give or sell; either of which would be good against the husband if done with his consent. It would indeed be considered his act. A bequest of a feme covert then to her husband with his consent, is nothing more or less, than a gift of the husband to himself. It is to be observed that there was no covenant or written agreement between the husband and wife in this case, that she might dispose of her separate estate. There was nothing more than his verbal assent that she might give it to him.

The opinion of the court is that the ordinary decided

correctly in refusing to admit this will to probate ; and this motion must therefore be refused.

Justices *Huger*, *Johnson* and *Richardson*, concurred.

Levy and *McWillie*, for the motion.

Holmes, contra.



ENOS TART vs. JAMES CRAWFORD.

Whether any and what kind of notice will dispense with the necessity of recording a deed, are questions for the court ; but whether the party had or had not such notice, is a question for the jury. (*a.*)

Tried at Marion, Fall Term, 1821. Trespass to try titles.

THIS was a motion for a new trial on two grounds :

1st. Because the presiding judge mistook the law, in charging the jury that nothing but *actual* and *explicit* notice of the existence of a deed, would dispense with the necessity of recording it.

2d. Because the presiding judge charged the jury that what was sufficient notice, was a question for the consideration of the court, and not for the jury.

Mr. Justice *Nott* delivered the opinion of the court.

The first question made in this case, was determined by this court at the last term, (*Ante* 265.) Indeed the opinion of the presiding judge in the court below, was expressed in the very words of the opinion delivered in this court on that occasion.

With regard to the second ground, the attorney who made out this brief, has mistaken the charge of the court. The judge stated to the jury that whether any, and what kind of notice would dispense with the necessity of recording a deed, were questions for the consideration of the

court. But whether the party had or had not such notice, was a question for the jury.

The motion was therefore refused.

Justices *Huger*, *Gantt* and *Johnson*, concurred.

Evans, for the motion.

Ervin, contra.

(a.) *Vide, ante*, 265, the same case.—R.

GOORE & DANAVANT vs. JOHN M'DANIEL.

An attachment creates a lien, which nothing subsequent can destroy, but the dissolution of the attachment, on the conditions mentioned in the act; therefore a junior execution must be postponed to it.

THIS was a rule against the sheriff of Chester district, requiring him to shew cause, why he had not satisfied a *fi. fa.* in this case with the money in his hands, made from the sale of chattels belonging to the defendant.

The sheriff shewed for cause, that the money in his hands had been made from certain goods of the defendant sold by virtue of sundry writs of attachment older than the *fi. fa.*

The rule was discharged by the presiding judge on the circuit.

A motion was now submitted to reverse that order, on the ground that a junior execution is to be preferred to a senior attachment.

Mr. Justice *Huger* delivered the opinion of the court.

An attachment creates a lien, which nothing subsequent can destroy, but the dissolution of the attachment, on the conditions mentioned in the act. Could a junior execution supercede it, the object of the act might be defeated whenever the defendant should think proper to confess a judgment preceding the proceedings in attachment; a re-

medy so uncertain would have been deceptive, and is not within the letter and spirit of the act.

The motion is dismissed.

Justices *Johnson, Colcock* and *Nott*, concurred.

Clendinen, for the motion.

Williams, contra.

ADMR'S OF JAMES HERLOCK, DEC. *vs.* JACOB RISER.

NATHAN HERLOCK *vs.* JACOB RISER.

Where the plaintiff was a shop keeper, and sued the defendant on an open account, most of the items of which were for *spirituous liquors*, he may nevertheless recover his account, and his books are admissible to prove it. Nor is he bound to prove that he had a licence to retail spirituous liquors.

The cases were tried before Mr. Justice *Gantt*, Orangeburgh district, April Term, 1821.

THESE were two summary processes on open account. Almost all the items consisted of charges for liquors sold in small quantities. Considering these establishments as nuisances, tending to idleness and the prostration of correct morals, and no license to retail being produced, the presiding judge ordered nonsuits to be entered up, notwithstanding the accounts were proved in the usual manner of merchants accounts.

Curia advisare vult.

Mr. Justice *Gantt* delivered the opinion of the court.

The court have viewed in the same light as the judge below, the consequences flowing from shops established for the sole purpose of vending whiskey and other ardent spirits; but under existing circumstances, as these accounts appear to have been legally proved, they think the nonsuits were improperly ordered.

The cases are therefore to be reinstated on the docket for trial at the next court.

Justices *Johnson, Huger, Nott* and *Cokeck*, concurred.

Nott & McCord, (for *Footman*,) for the motion.

Glover, contra.

THE STATE vs. BENJAMIN KANE.

It is very much to be doubted whether a person ought ever to be convicted of a felony on the uncorroborated testimony of a prosecutor who claims the property in question, where the defendant sets up a title in himself; and where the transaction was attended with none of the usual concomitants of larceny, as concealment, &c. the court, upon conviction, will grant a new trial.

This was an indictment for Hog stealing, tried at Sumter, Fall Term, 1821.

THE prosecutor swore that in the fall of 1820, he purchased of the defendant two sows. He let him have one of them back again. He understood from the defendant at the time he bought them, that they were all the hogs he had. The one which he kept, had pigs a little after Christmas. He kept them in an inclosure and fed them until sometime in April; corn then beginning to get scarce, he turned them out into the range. He fed them a few times, after which they stayed away and he did not see them again until July. He then found the pigs at the house of Mr. Bossard, where the defendant had lived and from whence he had just removed. The defendant claimed them as his own; but the prosecutor took them away and commenced this prosecution.

On the part of the defendant, *Martha Cook* was called. She said she lived with the defendant, from May until September. The pigs in question were running publicly about his house and he fed them there until he moved away.

Henry Blanchard saw them about the house and saw the defendant frequently feeding them.

There was some other testimony which it is thought is not of sufficient importance to report.

On this evidence, the jury found the defendant guilty.

'This was a motion for a new trial, on the ground that the verdict was contrary to evidence.

Mr. Justice *Nott* delivered the opinion of the court.

The rules by which this court is usually governed in an application for a new trial are so trite, that a repetition of them would appear like telling an old story, with which every one had become familiar; yet in every case we may expect to find a specific difference. A peculiar trait in the character of this case, is that both the prosecutor and the defendant claimed the property, and the prosecutor was the only witness to establish his own right. And I doubt very much, whether a person ought ever to be convicted of a felony, on the uncorroborated testimony of a prosecutor who claims the property in question where the defendant also sets up a title in himself. If the defendant could have been allowed his oath, there is very little doubt but he would have sworn with equal confidence that the hogs in question were his own. The transaction was not attended with any of the usual concomitants of larceny. The hogs were kept publicly and fed about his house. The prosecutor certainly could not have recovered them in a civil action, because he could not have been a witness himself. But on the contrary, I think there was testimony enough to have authorized the defendant to recover from him. Our laws would seem to fall short of that perfection of reason, which we are disposed to ascribe to them, if a prosecutor might upon his own oath only, convict a person of stealing his property, the value of which the person so convicted, might immediately turn about and recover from him. The difficulty of identifying animals of this description, goes very far in my opinion, to weaken the testimony of the prosecutor; while the fact, that there

never was at any time an attempt on the part of the defendant to conceal them, strengthens very much his claim to a new trial,

I am of opinion therefore, that the motion ought to be granted.

Justices *Huger*, *Gantt* and *Johnson*, concurred.

Huntington, for the motion.

Evans, solicitor, contra.

JOHN JOHNSON, ASSIGNEE, vs. WM. MAYRANT.

Where the plaintiff sued as assignee of one *Alexander*, the Court refused to amend his declaration, and suffer him to state *Alexander* as the plaintiff, and to strike out his own name.

THIS was an action of debt, brought by *John Johnson*, assignee of *Alexander* and *Price*, on a judgment.

Plea, *nul tiel record*, &c.

At the last March Term, the counsel for the plaintiff finding the amount of the judgment was not the same as the sum stated in the declaration, moved for leave to amend generally; which was granted by his honor Judge *Johnson*, who then presided.

At October Term a motion was made by the counsel for the plaintiff to file an amended declaration, one wherein *David Alexander* was stated as the plaintiff; and the following motion was granted by his honor Judge *Nott*:

"On motion of *De Saussure & Holmes*, ordered, that the amended declaration in this case, in which *David Alexander* is stated as plaintiff, be filed, and that the defendant do plead thereto."

From this decision the defendant appealed, and moved to rescind the order, on the grounds,

1st. Because a general order, giving leave to amend, would not authorize the substitution of an entire new declaration, with a different plaintiff, and that the order for

filing the amended declaration in this case is against law and practice on the subject of amendments.

2d. Because the declaration ordered to be filed is no amendment of the original one.

Mr. Justice Gantt delivered the opinion of the court.

I take it to be a well established principle, that in every case where an amendment is desired, there must be something to amend by, or the case cannot be cured but by a new action. *Sellon*, vol. 2, 456, after enumerating various amendments which may take place in every stage of a suit, adds these words, "It is necessary, however, that in all such cases there should be something to amend by; as the *præcipe* to amend the writ, the paper book to amend the roll, the judges notes to amend the verdict, &c. by which it may appear that the variance is a mistake, and therefore in strict justice ought to be rectified." And a distinction is taken between amending those mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk. The party plaintiff in this case has brought an action as assignee of a judgment obtained in favor of *David Alexander*, when in fact the judgment had never been assigned, and the amendment required is, that the name of a new plaintiff is to be substituted in the declaration, in lieu of the one commencing the action. There is nothing in the writ which can possibly justify such an application. There is no clerical mistake here requiring amendment that justice may be done; but the object to be attained is, the shifting the burthen of a suit from the shoulders of *Johnson*, who had no right to institute it, upon those of *David Alexander*, and who, for all we know, may have been satisfied for this debt, or unwilling to sue the defendant upon the judgment. Suppose *David Alexander* were now present, and should declare his unwillingness to be made a party to this suit, could this court force him into the action, *volens volens*? I think not, as the declaration allowed to be filed in this case would constitute, to all intents

and purposes, an entirely new and distinct suit; by making a different plaintiff, it cannot be considered in the light of an amendment. If this judgment has not been assigned to *Johnson*, the defect in bringing this action can never be cured; it vitiates the proceedings *in toto*, and renders them null and void. It is not an irregularity which may be cured or waived by an amendment.

The motion made in this case to set aside the order giving leave to file a new declaration, is granted.

Justices *Johnson*, *Huger* and *Cock*, concurred.

Mayrant, for the motion.

De Saussure and *Holmes*, contra.

THOS. McCRAY *ads.* JNO. MADDEN.

Where the defendant had received goods for the purpose of paying the debts of A. and promised B. who had a note of A. and who was about to attach property in the hands of the defendant, that if he would wait until fall he would pay the note; the Court *Held* the promise good, and not within the Statute of Frauds.

The promise being made to the agent of B. is the same as if made to B. himself.

Tried at Laurens, Fall Term, 1821, before Mr. Justice *Gantt*.

THE brief states that this was an action within the summary jurisdiction, founded on a note which the plaintiff held on one *Jos. McCray*, on a parol promise made by the defendant to *Henry Gray*.

The defendant pleaded the Statute of Frauds.

Henry Gray, the only witness in this case, proved that he called on defendant and informed him that he held a note on his brother *Joseph McCray* for \$53 40. That he, the witness, understood the defendant had effects belonging to *Jos. McCray*, for the payment of his debts. The defendant informed the witness that he was security for his brother *Jos. McCray*, to a large amount, and if he,

Henry Gray, *would wait until fall, he would pay the debt*; also that his brother would return in the fall, when all his debts would be paid. The defendant said further, that he had effects of *Jos. McCray's* in his hands to make himself safe as his security, and *also for the payment of his debts*. But the defendant did not say he had effects to pay *this* debt, for which the action was commenced. The witness also proved that he did not inform the defendant that this note was owing to the plaintiff; nor did he mention plaintiff's name at the time the promise was made.

The presiding judge gave a decree for the plaintiff, for the amount of the note; from which, the defendant appealed, and moved the constitutional court to reverse the circuit decree, on the following grounds:

1st. Because it was a collateral promise, and within the Statute of Frauds.

2d. Because the promise was made to the witness *Henry Gray*, and not the plaintiff.

Mr. Justice *Gantt* delivered the opinion of the court.

Whether the promise made in this case, is to be considered as a collateral one, and void by the Statute of Frauds, will depend upon the fact of the defendant having effects in his hands at the time of the promise, to pay the debt due by this note from the absent debtor to the plaintiff. From my notes, which in substance, coincides with the statement made in the brief, it appears that the plaintiff *Madden*, having a note of hand given to him by *Joseph McCray* for \$53 40 cents, placed the note in the hands of *Henry Gray* as an agent, to call on the defendant for payment, *Joseph McCray*, the debtor, being absent from the state.

It was the plaintiff's intention to attach in the hands of the defendant in the event of the note not being paid.

Gray, as agent for the plaintiff, called on the defendant and required that payment should be made; stating that the plaintiff would take out an attachment unless the note was paid. Upon which, the defendant said that if the

plaintiff would not take out an attachment, but let it stand until the next fall, he would pay the amount due by the note, as he had effects in his hands for that purpose. Under this promise made by the defendant, the plaintiff declined taking out the attachment. The defendant failed to pay the debt, and the plaintiff instituted his action.

It has been decided that if a person obtains possession of goods, on which a landlord has a right to distrain for rent, and he promises to pay the rent, though it is clearly the debt of another; yet a note in writing is not necessary. (See 2 *Selwyn*, 858.)

In principle, these two cases are analogous; the obligation however to pay in the instance before us, is much stronger than in the one quoted. The defendant acted as trustee for the benefit of creditors merely; here the defendant acknowledged that the absent debtor had placed in his hands effects to pay his debts, and, according to my notes, effects for the purpose of paying this debt.

Is he to apply the effects to his individual benefit, and be absolved from all responsibility arising from the promise? I think not. He has denied to himself a benefit by the possession of the goods and the promise is thereby rendered obligatory upon him.

On the 2d ground, I have only to remark that the demand of payment by *Gray*, in right of the plaintiff and evidenced by the note not being transferred, places the case precisely upon the footing of a demand by the plaintiff himself. The note was due to the plaintiff, and the promise was to pay that debt if no attachment was taken out. It is the opinion of the court, that the motion made in this case to reverse the decree made in the court below, must fail.

Justices *Huger*, *Johnson*, *Nott* and *Colcock*, concurred.

O'Neill and *Irby*, for the motion.

Downs, contra.

J. C. MASSEY vs. THOMAS CRAINE.

Where the defendant purchased a tract of land of the plaintiff, to whom the plaintiff gave a conveyance in the form prescribed by the act of 1795, (with a warranty against all lawfully claiming, &c.) and afterwards, when he called upon the defendant for his note for the purchase money, promised the defendant that his wife should renounce her dower, which was an objection made by the defendant to his giving his note, the Court *Held*, that this promise, made after the conveyance, was without consideration, and against the policy of the law.

And in action upon such note, where a discount was set up, that the wife's dower, had not been released, the Court *Held*, that the defendant could be allowed nothing for the dower; for as the husband is now living, it is only possible that the right of dower may accrue, and a possible injury is not a subject for damages.

THIS was an action of assumpsit on a promissory note, which had been given for a lot of land in the village of Lancaster.

It appeared that subsequent to the execution of the deed, (which was in the form prescribed by the act of 1795, 1 *Brev.* 176. 2 *Faust* 5,) the plaintiff called for the note, which the defendant hesitated to give, saying that the dower had not been renounced. The plaintiff then promised that his wife should come from North-Carolina, (where she then was,) and renounce her dower. There was no evidence of her having done so; and the defendant contended that he was entitled to a discount to the value of her dower.

The judge on the circuit charged the jury to find a verdict for the full amount of the note, which was done.

A motion was now submitted for a new trial on the following grounds, viz:

1st. That defendant was entitled to damages for the non performance of plaintiff's promise.

2nd. That the covenant in the deed was broken, as the wife had not renounced her dower: and for this, the defendant was entitled to damages.

Mr. Justice *Huger* delivered the opinion of the court.

The promise made subsequent to the execution of the deed, was without consideration, as the note then given was the consideration of the deed. The promise was also against the policy of the law, which secures to the wife her dower, independent of the control of her husband. Neither is a possible injury a subject for damages; and as the husband is now living, it is only possible that the right of dower may accrue. On the first ground, the motion must fail.

The deed contains the usual covenant, that plaintiff will for ever defend defendant, his heirs and assigns, against every person lawfully claiming or to claim the premises, &c.

If this be regarded as a warranty of seizin, it has not been broken, for plaintiff was seized. If a warranty for quiet enjoyment, it is not broken, for defendant's possession has never been disturbed. The plaintiff's title in every respect was good, and no warranty with respect to title can have been broken. But it is contended that from the words of the covenant, an implied warranty arises, that the wife shall renounce her dower. Such a warranty would be contrary to the policy of the law, and therefore cannot be implied by the law; but if it could, the injury would be only possible during the life of the husband, and therefore not a subject for damages.

The motion must fail.

Justices *Johnson*, *Colcock*, *Nott* and *Gantt*, concurred.

Williams, for the motion.

Miller, contra.

THE EXECUTORS OF LINDSAY vs. ARCHIBALD LINDSAY.

A discount to an action on a note, *within the summary process jurisdiction*, which involves the titles to land, is inadmissible.

It seems that where the defendant has a *bona fide* defence involving a

title to land, that on application to the circuit court, an order requiring the plaintiff to declare, may be obtained, by which means he may avail himself of such defence.

THIS was a summary process on a promissory note for \$——. A plea to the jurisdiction of the court was said to be filed, but was not produced. As the sum was within £20, and there appeared on the face of the proceedings, nothing to support the plea, it was overruled. A discount was then offered, which had been duly filed; in which the defendant claimed a deduction *pro rata*, for a deficiency of the land, for which the note was said to have been given.

The discount was also overruled, and a decree was given for the plaintiff.

From that decision an appeal was now made to this court.

Mr. Justice *Huger* delivered the opinion of the court.

On the first ground it is only necessary to observe, that as the plea is not produced, and was not filed, it is impossible to controvert the decision of the circuit court.

The act of the legislature which gives to the circuit court summary jurisdiction, expressly excepts all such cases as involve the title to lands. On this ground, discounts similar to the one in question, have invariably been overruled.

To obviate hereafter the difficulties, which are said to have been experienced in this case, it is suggested that when a defendant has a bona fide defence involving a title to land, that on application to the circuit court, an order requiring the plaintiff to declare, might be obtained, in which case a defendant might avail himself of such defence.

The motion in this case must however be refused.

Justices *Johnson*, *Colcock*, *Nott*, *Gantt* and *Richardson*, concurred.

Williams, for the motion.

Rogers, contra.

This court has always refused to act upon any agreement between council, about which they differ and which is not in writing.

JOHN GAGE, SEN. *vs.* ADM'R. OF COL. H. JOHNSON,

One Co-Administrator, as well as a Co-Executor, may discharge a debt due to his intestate.

THIS was an action of assumpsit on an open account, amounting to \$865 59, several items of which were entered in plaintiff's book, subsequent to the date of a receipt in full of his account; and some of the items were charged to intestates children by name, all of whom were living with him, and only one of them of age. The items objected to in the account were equal to \$53.

The defendant offered a note drawn by plaintiff, and made payable to the administrators of the deceased in discount. The defendant produced a receipt from one of the administrators, acknowledging that this note was satisfied to three or four dollars.

The jury found a verdict for the plaintiff, to the amount of \$808.

A motion was now made for a new trial on two grounds:

1st. That the jury had allowed the items charged anterior to the receipt in full, as well as such as were charged to the children by name.

2nd. That the receipt signed by one of the administrators was not a discharge of the debt due by the plaintiff.

Mr. Justice *Huger* delivered the opinion of the court.

It appears that the items objected to, when added to the balance due on the note, amount precisely to the difference between the amount of the account and the verdict. It is unnecessary therefore to notice further the first ground.

That one executor could discharge a debt due to his testator, has never been denied; some doubt however, formerly existed as to the power of a co-administrator.

But in the case of *Williard vs. Fenn*, ————— after repeated arguments the Court of King's Bench, ruled that a co-administrator was possessed of the same power in this respect as a co-executor. This has been regarded as settled doctrine ever since, and is not now to be disturbed.

The motion is refused.

Justices *Colcock*, *Richardson* and *Gantt*, concurred.

McKibbin, for the motion.

Williams, contra.

EX PARTE, WILLIAM VANCE.

In every case of appeal (by act 1815,) where the decision is against the appellant, 7 per cent. interest is allowed on the amount recovered, from the day of the verdict to the time when the appeal is dismissed.

And when in trover, the jury found an alternative verdict for \$3,000 or a return of the property converted, which property, after the dismissal of an appeal by the defendant, was returned to the plaintiff, the Court held this case no exception to the general rule, and allowed interest on the \$3,000 from the day of the verdict, until the appeal was dismissed.

September 6, 1821.

THIS was a motion to *quash* or *suspend* an execution issued at the instance of *Joseph Ratcliff vs. William Vance*, on a recovery had in an action of trover, wherein the verdict was given in the alternative, viz: to pay three thousand dollars, or to deliver up certain negroes, the subject of the action. From that verdict there was an appeal to the constitutional court on a motion for a new trial; and in the conclusion of the opinion delivered by Judge *Cheves* therein, it is stated that "the ground of the motion for a new trial, is without even the semblance of plausibility." He concludes that the appeal was in the full sense of the word *frivolous*. On the decision thus had in the court of appeals, the negroes were delivered up by *Vance* the defendant, to the plaintiff, who accepted them; but execu-

tion was taken out for the interest accruing on the \$3,000, from the time of the recovery had, to the dismissal of the appeal; and it was urged on the motion now made, to quash or suspend that execution, that the verdict was not such as would by the law of the state, convey interest.

On the argument of the case at Chambers, and from the authority of the case of *Norris and others vs. Beckley*, (2 *Const. Rep.* 228,) Judge *Gantt*, before whom the motion was made, was inclined to think that the view taken by the defendants counsel was a correct one; but on a more minute examination of the case of *Beckley*, and the purport of the act of Assembly of 1815, for the prevention of frivolous appeals, he was inclined to take a different view of what he then deemed the law of the case. "He said the act of 1815, in every case of appeal where the decision was against the appellant, allowed interest on the amount recovered, at the rate of 7 per cent. from the day the verdict was given, to the time when the appeal should be dismissed. Then the amount recovered in this case was \$3,000. On the dismissal of the appeal, the plaintiff accepted the negroes as an equivalent to that amount. Now whether the payment of the amount recovered, was in money or any thing else, was immaterial. The interest for the delay in paying it follows from the terms of the act, like the shadow the substance. It cannot with reason be supposed that the negroes were more valuable when delivered, than when the recovery was had, unless like wine they are bettered by age; consequently their acceptance cannot be urged as a reason why the plaintiff should not avail himself of the indemnification expressly given by the act of 1815, for the delay in coming at his right occasioned by the act of the defendant, and as Judge *Cheves* in writing the opinion, declared without a shadow of pretence for so doing. The right to 7 per cent. is secured to the plaintiff by the act of 1815, as before stated, and the law must have its effect.

"The motion to quash or suspend the execution issued in this case must therefore fail."

From this decision made at Chambers, an appeal was claimed to this court :

1st. Because the plaintiff having taken such a verdict, he is bound by it.

2nd. Because having accepted the negroes, it was a discharge of the verdict by the very terms of it.

3rd. Because the law giving interest in cases of appeal, relates only to *contracts*.

Mr. Justice *Gantt* delivered the opinion of the court.

The court have duly considered those several grounds, and which were equally insisted on before the Judge at Chambers. They cannot avail the appellant. The motion is therefore dismissed, and the opinion at Chambers sustained, for the reasons therein given.

Justices *Nott*, *Johnson* and *Huger*, concurred.

———— for the motion.

———— contra.

JACOB KOOGLER *ads.* JACOB HUFFMAN.

A judgment between A. and B. in a Court of Equity on a bill by A. against B. to make titles, will be conclusive in an action at law between A. and C. as to the execution of a power of attorney from D. the original owner, to B. to sell. (*a.*)

THIS was an action of trespass to try title. To complete the plaintiff's chain of title it became necessary to prove a conveyance from *Andrew Dewees* to *James Boatwright*. And for this purpose a conveyance was given to *James Boatwright*, signed by *Asa Delozeair* for himself, and also as agent for *Andrew Dewees*. And the plaintiff offered in evidence the proceedings in the Court of Equity, in a case wherein *James Boatwright* was complainant, and *Asa Delozeair* and *John Bostick* defendants ; to which the defendant objected. But the objection

was overruled, and the said proceedings were given in evidence.

No power of attorney from *Andrew Dewees* to *Asa Delozeair* was proved; and the only authority shown was a letter referred to in said proceedings, but not proved on the trial in this case, importing to have been written by *Andrew Dewees*, not under seal, to *Asa Delozeair*, requesting him to sell the land, and stating that he would make the title.

The defendant moved for a nonsuit, which the court refused.

The jury found a verdict for the plaintiff.

The defendant gave notice that he would move the Constitutional Court for a nonsuit, on the ground,

That the plaintiff showed no title from *Andrew Dewees* to *James Boatwright*.

And for a new trial, upon the following grounds:

1st. Because the court admitted in evidence the proceedings in the Court of Equity aforesaid.

2d. Because, in finding a title from *Andrew Dewees* to *James Boatwright*, in conformity with the charge of the court, the verdict of the jury was contrary to law and evidence.

Mr. Justice *Golcock* delivered the opinion of the court.

In deciding on the grounds for a new trial, the ground for a nonsuit will necessarily be determined on.

In the argument below, it was contended that the decree and proceedings in the court of equity, ought not to be given in evidence, because the defendant was not a party to them; and the general doctrine that judgments cannot be given in evidence, except between parties and privies, was relied on. As to this form of objection the law is clear, upon any collateral matter, any judgment or decree may be introduced. All that is meant by the rule is that the rights of a party cannot be determined on conclusively, unless he be a party, (*Phillips* 220. *Gilbert* 54. *Buller* N. P. 244. 2 *Espinasse* 457.)

If this had been a title from a sheriff, it would have been necessary to introduce the judgment and execution against the debtor, under which the sheriff sold. The same objections nearly have been made to that, and it may have been said the defendant was not a party to that. Any further observation on this point is certainly unnecessary.

But it was also intended on that occasion, as it now is, that the proceedings should not have been admitted, because *Dewees* was not a party to the bill. But that objection is equally unsubstantial. The court of equity having jurisdiction in the matter, determined that the title should be made by *Delozeair*; in other words determined that the letter of *Dewees* was sufficient to authorize the sale of the land and consequently the making of titles.

This decision affected none of the rights of the defendant. And it is not for him, a stranger, to complain that justice has not been done to *Dewees*. Whether *Dewees* ought to have been a party, and whether he was considered as a party, are not for this court to decide. The judgment of the court of equity is conclusive, that *Delozeair* had authority to convey.

It was said the hand writing of *Dewees* to the letter, should have been proved. In the case put of a deduction of title, through a sale by the sheriff, when the judgment under which he acted was produced, could the defendant be permitted to say that the hand writing to the note on which the judgment was founded, had not been proved and ought then to be proved? Certainly not. There is no possible view which can be taken of the effect and operation of this decree of the court of equity, in which it will appear that the rights of the defendant have been affected; nor indeed was this ever alledged on the part of the defendant. Where then is the ground of objection? If the land was *Dewees's*, the right is transferred; if not, the decree avails nothing; and the defendant may prove to whom it does belong. To shew that *Dewees* may by possibility have been injured, is certainly not sufficient to destroy the effect of the decree. The case bears

a strong analogy to the case of *Hall* and *Carruth*, decided a few days ago, and to all that class of cases in which lands are sold for partition, and a title made *pro forma*. (See 4 *Wheatons Rep.* 220.) But if it were important it appears from the subject before the court, that it was wholly unnecessary that *Deweese* should have been made a party to the bill.

The motion is dismissed.

Justices *Nott*, *Huger*, *Gantt* and *Richardson*, concurred.

Gregg, for the motion.

Stark, contra.

(a.) See *Post*, *Hall vs. Carruth*. R.



JOHN ROBERTS vs. JOSEPH BROWN.

A magistrates jurisdiction extends in cases of domestic attachments to §20, and is not confined to 3l.

Tried at Laurens, Fall Term, 1821.

THE plaintiff in this case had a verdict for \$40; and the only point submitted to the court, on the defendants motion for a new trial, was, whether a magistrate has jurisdiction in cases of domestic attachment arising out of contract, when the demand exceeds three pounds? If he had not, the verdict was right, but if he had jurisdiction as far as §20, the verdict was wrong.

Mr. Justice *Johnson* delivered the opinion of the court.

The question propounded, depends wholly on the construction of the acts of assembly creating and defining this jurisdiction, and to these we must look for its solution. The first in point of time, necessary to this case is the act of 1785. This act points out the character of all the cases to which this jurisdiction is to be confined, including cases arising, *ex contractu* and limits the amount to £3,

and then provides that "upon complaint made to a justice of the peace that any person indebted to the complainant in a sum not exceeding £3, (when a single magistrate by this act has jurisdiction,) is about to remove, &c. it shall be lawful for such justice, &c. to grant an attachment against the estate of such debtor, &c. returnable before himself or some other justice of the peace, who shall and may proceed and determine finally thereupon, as to justice shall appertain." (*Public Laws*, 368. 1 *Brev.* 40.)

Subsequent to this period, several acts have been passed on this subject; but that which is at present regarded as defining and limiting the jurisdiction of a magistrate, is the act of 1799. This provides that it "shall extend to *all matters* of debt or other demand arising out of contract, and in *no other case of a civil nature whatsoever*, to § 20." (1 *Brev.* 476. 2 *Faust*, 318.) And upon looking into this act, it will be seen that no mention is made of proceedings by attachment, and the objection to extending it to this amount, is that it is expressly limited to £3 by the act of 1785; and under the rigid rule of construction applicable to limited powers cannot be extended beyond it. But if we look to the intention of the legislature, the most certain and universally true rule, I think a different result will follow.

The clause of the act of 1785, quoted, appears to me not to have been intended to create a new and distinct jurisdiction, but to point out the mode of proceeding in the particular case of attachment; and the limitation it contains seems to have been introduced with a view to avoid the consequences of a construction which might possibly give this power an unlimited extent without these guards about it. Again, the act of 1799, expressly gives to the magistrates jurisdiction of *all matters* arising *ex contractu* as far as § 20; and provides that it shall extend to *no other cases of a civil nature*. And if a contrary construction was permitted to prevail they would be ousted of jurisdiction in

all cases of absconding or removing debtors ; for the process of attachment is the only one which can reach them.

The motion is therefore granted.

Justices *Huger* and *Colcock*, concurred.

Young, for the motion.

O'Neill and *Irby*, contra.

BIGGUS vs. BRADLY.

A purchaser of land may maintain an action of covenant on the warranty, (against all persons lawfully claiming or to claim,) before eviction, by showing a paramount title in a third person ; but where the plaintiff claimed a tract of land and thinking that the defendants title was better than his, and, to obtain this outstanding title, purchased this tract, with two others adjoining, and took a deed in the form prescribed by the act of 1793, (containing a warranty as above,) and afterwards discovered that his first title was better than the second, and commenced his action against the defendant, for a breach of the warranty, not being disturbed by the claim of any third person, the Court nonsuited the plaintiff ; because it could not be intended that the vendor would give a warranty against the title of the vendee himself, when it was bought for the purpose of protecting that title.

THIS was an action for a breach of contract.

The plaintiff had purchased a tract of land, which he held for two or three years without disturbance ; he then discovered as he supposed, that the defendant had a better title to the land than his own. To obtain this outstanding title, he opened a negotiation with defendant and ultimately purchased from him, this tract and two others adjoining it. A deed in the form prescribed by the act of 1795, (1 *Brev. Dig.* 176. 2 *Faust* 5,) was executed. Some time after the purchase of this outstanding title, the plaintiff discovered, or thought he discovered, that his first title was better than his second, and commenced the present action.

A nonsuit was ordered in the circuit court, from which the plaintiff now appealed.

Mr. Justice *Huger* delivered the opinion of the court.

The terms of the covenant are, that the defendant will forever defend "the plaintiff, his heirs and assigns, against every person lawfully claiming or to claim the premises." This is not in terms a covenant of seizin, and according to the English law, unless the vendor covenant that he is seized, an action of covenant will not lie before the purchaser has been evicted. Nor does it imply such a warranty from a general warranty of title. (2 *Bos. & Pull.* 13. *Doug.* 654. Implied warranties are not favoured by the common law, and are only tolerated for the convenience of trade, (with the usages of which, the contracting parties are supposed to be acquainted,) and to which they are understood to refer. To chattels, however, these warranties principally apply and are confined to title and actual misrepresentation or disguise. (*Cro. Jac.* 474. 1 *Roll. Abrid.* 90. *F. N. B.* 94. 2 *Roll. Rep.* 5.) Our courts, however, have abandoned the known and safe rules of the common law in this respect, and adopted the more dangerous, if more inviting maxim of the civil law, "that a sound price implies the warranty of a sound commodity," and have superadded the maxim of *caveat emptor*, and had they gone one step further, as they were invited to do, (and not without some hope of success) in the case of *Whitfield and McLeod*, (2 *Bay*, 380,) and determined that a fair price raised an implied warranty of the adequacy of consideration, free agency would have been destroyed and no contract could have been regarded as binding, to which the seal of a court was not appendant. This doctrine of implied warranty has not been confined to chattels. In *Champneys vs. Johnson*, decided in Charleston in 1809, and in *Johnson vs. Nixon*, decided in Columbia in 1811, and in many other cases antecedent thereto, this court ruled that to effect the real object of the parties to the deed, that a warranty may be implied. It is in this way the court has been induced to sustain an action for a breach of warranty before eviction, where the terms of the warranty did not import a warranty of seizin. In doing so, howe-

ver, they have extended the doctrine of implied warranty even beyond the rules of the civil law, from which they professed to borrow it; for by the civil law, a purchaser cannot proceed against a seller on the warranty before eviction, or some interruption to his quiet enjoyment. (*Domat, Lib. 1, Tit. 2.*)

In France, this rule of civil law has been so far altered as to permit the purchaser, on action being commenced against him for the land, to proceed in his action on the warranty against the seller; so that the purchaser on being evicted receives immediate compensation for the injury. (*Code Civil des Francais, L. 3. T. 6. C. 4.—2 Nott and McCord 198.*)

If the rule of the common law has been abandoned and that introduced from civil law very much forced to give effect to the intention of the parties, it becomes necessary to enquire what must have been the intention of the parties to this covenant at the time it was executed?

The plaintiff had his first titles in possession. He was well acquainted with them. He was also made acquainted with the defendants titles. In procuring the last, he could not have intended to protect himself against the first. It must have been to protect himself against the defendant and all that might claim adversely from himself, and defendant undertook to defend the plaintiff and his heirs,—against whom? Not themselves assuredly, but against all others, claiming or to claim,—against whom? The plaintiff and his heirs. No one has yet disturbed the plaintiff in the enjoyment of the property. No one has commenced an action against him, and there is no outstanding paramount title which can interfere with him. The object then of the parties has been accomplished; at least it has not been defeated, or is it likely to be defeated.

The plaintiff's knowledge of his own title, when the contract was executed, must be a bar to his recovery in this action. In the case of *Whitfield vs. McLeod*, (2 Bay 280,) it was ruled that when the plaintiff was acquainted with

all the circumstances, and had a fair opportunity of informing himself of them, he was bound ; and this is in conformity not only to the common law, but to the civil law, for by this, the seller is not bound to restore the price paid, if the purchaser knew at the time of sale, the danger of eviction. (*Code Civil des Francais*, L. 3. Tit. 6. 64.)

Justices *Johnson*, *Colcock* and *Nott*, concurred.

Gist & Thompson, for the motion.

Glendinen & Williams, contra.

BONSALL, ADM'R. OF BONSALL, vs. TAYLOR, SURVIVING
EX'R. OF RIVES.

The plaintiff in an action on a penal bond, cannot recover more than the penalty where the interest exceeds it.

In debt on judgment upon a penal bond, the plaintiff can recover interest beyond the penalty. (*a.*)

Tried before Mr. Justice *Gantt*, at Richland, Spring Term,
1821.

THIS case exhibited two questions for the consideration of the court.

1st. Whether, in an action on a penal bond, the plaintiff can recover more than the penalty when the interest exceeds it ?

2d. If he cannot, whether he is not entitled to interest from the date of the judgment to the time of its satisfaction ?

Mr. Justice *Johnson* delivered the opinion of the court.

The first question would perhaps furnish some room for speculation, as there is considerable diversity and perplexity in the authorities relied on. It is only important, however, that there should be a known and established rule on the subject, and we are relieved from the necessity of investigating the question by the unanimous concur-

rence of the court in the opinion that the plaintiff is not entitled to recover more than the penalty of the bond.

On the second question also there is no difference of opinion. The plaintiff is entitled, under the act of the legislature of 1815, to interest on his judgment, from its date up to the time of satisfaction, and to have his execution therefor: And in an action founded on such a judgment, he is also entitled to recover the interest.

The motion in this case is therefore granted only so far as relates to the interest which accrued subsequent to the judgment.

Justices *Colcock, Nott, Richardson and Huger*, concurred.

Gregg, for the motion.

Stark, contra.

(a.) See *ante*, 328, *Adm'rs of Smith vs. Vanderhorst, Ex'or. of Shackelford*, where the court decided the same point, without any reference being made to the act of 1815, allowing interest on judgments, where founded on a cause of action which bore interest previous to judgment. R.



CHARLES FOWLER, GUARDIAN, vs. JOHN STUART.

Where the jury found a verdict, in support of a parol gift made in these words, the court supported it, viz: "I beg you to recollect *I have given that horse to my son.*" (a.)

If the intention of the donor be doubtful, it seems, the delivery ought to be fully proved. If the intention to give be evident, slighter proof of delivery may be sufficient. If however any proof of the intention and delivery be afforded, it becomes a question of fact on which the jury must decide, and their decision will be supported, unless very much against the weight of evidence.

When the right of property is in the plaintiff's ward, and the defendant holds over after action commenced, very slight evidence of a conversion is sufficient; therefore where the plaintiff's ward, who lived with his uncle the plaintiff, was the owner of a horse, which horse was demanded of the defendant by the plaintiff, before he was legally appointed guardian for his ward, in the name of his ward, and the

defendant replied that the horse did not belong to his nephew, and refused to deliver him up, the Court *Held* that the uncle should be regarded as the agent of his nephew, and a demand by him as equivalent to a demand by his nephew. (*b.*)

THIS was an action of trover for a horse.

It appeared that a few days before the defendant was married to the mother of the plaintiff's ward, she, in the presence of the defendant and several witnesses, whom she requested to bear witness to the gifts she was about to make, gave to each of her children some property. To her daughters she gave a negro a piece, and delivered the property at the time. To her son, (the plaintiff's ward) she gave the horse in question, and was about to proceed to the stable where he was kept, to make an actual delivery, but was prevented by rain. She then turned to the witnesses and observed, "I beg you to recollect *I have given* that horse to my son." One witness understood her to say, that the horse was to be her sons after her death. The son who lived with his mother some time after her marriage, was in the habit of riding this horse, and when he abandoned the house of his mother, to live with his uncle, the plaintiff, he took the horse with him. This was done, however, without the knowledge of his mother, or the defendant. Some days after he went to the plaintiff's to live, he rode to the village of Laurens. He there dismounted and left the horse at the door of a tavern. The defendant accidentally passing by at that moment, discovered the horse and took him away. The horse was afterwards demanded of the defendant by the plaintiff, but this was done before he was regularly appointed the guardian of his nephew. The defendant refused to deliver up the horse; in consequence of which, this action was commenced.

The jury found a verdict for the plaintiff.

A motion was now made for a new trial on two grounds:

1st. That there was no gift proved.

2dly. That the evidence of a conversion was not sufficient.

Mr. Justice *Huger* delivered the opinion of the court.

A delivery is generally necessary to perfect a parol gift of chattels. If the intention of the donor be doubtful, the delivery ought to be fully proved. If the intention be evident, slighter proof of the delivery may be sufficient. If however, any proof of the intention and delivery be afforded, it becomes a question of fact on which the jury must decide, and their decision will be supported unless very much against the weight of evidence.

In this case, the intention to give was manifest, for although one witness thought the gift was not to take effect, until after the death of the donor, yet all the others understood it differently, and the improbability of the horse surviving the donor, who was young enough to be married, is confirmation of their statement, that the gift was intended to take effect *in presenti*. The evidence of delivery in this case is very slight; the jury, however, thought it sufficient when compared with the unquestionable intention of the donor *to give*, to support the gift, and this court will not disturb the verdict on that ground.

When the right of property is in the plaintiff, and the defendant holds over after action commenced, very slight evidence of a conversion is sufficient. In this case, the horse was the wards. The defendant took possession of him. The uncle, with whom the ward was staying, demanded the horse for his nephew, and was told that the horse did not belong to his nephew, and therefore would not be given up. Had the ward himself made the demand, it would have been sufficient. The uncle, if not his duly appointed guardian, was at least to be regarded as his agent, and a demand by him as equivalent to a demand by

his nephew. The jury therefore were authorized to find the verdict they did.

The motion is refused.

Justices *Johnson, Nott, Gantt* and *Richardson*, concurred.

Mr. Justice *Colcock* dissented.

McDuffie, for the motion.

O'Neill, contra.

(a.) See *Brashears vs. Blasingame*, 1 *Nott & McCord* 223. *Davis vs. Davis*, *Do.* 226. *Reid vs. Colcock*, *Do.* 592. *Grangiac vs. Arden*, 10 *Johns.* 293.

(b.) See *ante*, 429, *Jones vs. Dugan*. R.

AINSLEY HALL, et al. vs. ADAM CARRUTH.

Where the plaintiff had bought a tract of land at Sheriff's sale, but no title was executed by the Sheriff, and afterwards, filed his bill in Chancery against the successor of the Sheriff, to have a title executed, which, in pursuance of the decree of that court, was executed to the plaintiff, the Court *Held* that such title was admissible in an action to try titles between the plaintiff and a third person, and that they would not look into the proceedings of the court of equity to ascertain in what manner they acted, it was enough that they had power to act and had acted, and their decree was as binding as a judgment of this court. (a.)

THIS action was brought to try the title to a tract of land in Greenville district. The land in dispute, had been sold by Samuel Saxon, the sheriff of the former district of Ninety-six, as the property of *John Goodwyn*, and was purchased by *Jesse Goodwyn*, who died immediately afterwards. Part of the purchase money was paid by *Jesse Goodwyn*, and the balance by *John Hopkins*, his administrator, but no title was executed by the sheriff.

To enable the plaintiffs to try their title to this land, at law, the court of equity ordered the sheriff of Greenville

district, (which is that part of the former district of Ninety-six, in which the land in question was located,) to make titles to the plaintiffs, who were heirs at law to *Jesse Goodwyn*. A deed was accordingly executed and produced at the trial of this case ; but was rejected by the circuit court, in consequence of which the plaintiffs were nonsuited.

A motion was now submitted to reverse the order of the circuit court.

Mr. Justice *Huger* delivered the opinion of the court.

It is unnecessary to enquire if the sheriff of Greenville district was the successor of *Saxon*, the sheriff of the former district of Ninety-six, or whether he was authorized, under the act of the legislature, to make titles to the plaintiffs. He acted in obedience to the order of the court of equity, as appears from the deed he executed. The only question then, for the consideration of this court, is as to the validity of that order.

There can be no doubt that the plaintiffs were entitled to the deed. The land had been purchased and paid for by their ancestor. They could not however proceed at law, against the defendant, without this necessary link in the chain of title. Who should execute the deed, was a question of doubt. To effect their object, they produced from a court of competent jurisdiction, an order for the sheriff of Greenville district, to make titles. We will not look into the proceedings of the court of equity to ascertain in what manner they acted ; it is enough that they had power to act and have acted. Their decree is as binding as a judgment of this court. The deed executed by the sheriff of Greenville district, was therefore competent evidence, and ought to have been received.

Were it necessary to enquire into the object of the court of equity in ordering titles to be made, it would appear, I think abundantly evident, that it was only to enable the plaintiffs to sustain their action of trespass to try titles at law. If however they had an ulterior object in view, that

cannot be defeated by giving effect to that part of their order which required the aid of this court. After verdict had, they can and I presume will proceed for the consummation of their purpose.

The order for a nonsuit must therefore be reversed.

Justices *Johnson, Colcock* and *Nott*, concurred.

Davis, for the motion.

McDuffie, contra.

(a.) See *Post*, the case of *Huffman vs. Koogler*, and *Hopkins vs. Lee* 6, *Wheat*. 109. R.

JOHN NEWSON ADS. JOHN AXON.

An innkeeper is liable for all losses which might have been prevented by ordinary care. (a.) And, it seems, where ever it be doubtful, whether ordinary care has been used or not, the presumption is against the bailee. If he do not rebut the presumption of a want of ordinary care, arising from the loss of the goods bailed, he is responsible.

Where the horse of a guest was put into a stable which was very open, but which had a bar to one door and a lock and key to the other; although the key was delivered to the servant of the guest, yet the innkeeper is liable for a horse stolen out of his stable and it seems it would have been the same, had the stable been properly constructed.

Ordinary care, is a question for the jury.

THIS was an action brought to recover the value of a horse, stolen from the stable of the defendant, who was an innkeeper.

The plaintiff when travelling, stopped at the house of the defendant, with three horses and two servants. The horses were put into the stable, which was very open, although there was a bar to one door, and a good lock and key to the other. The hostler wished, at the usual hour of the evening, to lock the stable door, and carry the key into the house, but this was objected to by the servants of the plain-

tiff, who said they would sleep in the stable, and did not wish to be locked in. It did not appear, whether the door had been locked, or how the stable was entered, but the next morning it was discovered that one of the horses was stolen.

A verdict was had for the plaintiff.

A motion was now submitted for a new trial, on the ground, that an innkeeper is only responsible for ordinary neglect, and that in this case, no such neglect appeared.

Mr. Justice *Huger*, delivered the opinion of the court.

Public utility requires that innkeepers be held liable for all losses which might have been prevented by ordinary care. Ordinary neglect is but the absence or want of ordinary care, (*Law of Bailments*, 24.) Whether ordinary care was used by the innkeeper, was a question for the jury; and unless they have found very much against the weight of evidence, their verdict is not to be disputed.

It is the duty of innkeepers to provide good and sufficient stable; if they do not, they are responsible for the consequences. How far the loss in question was to be attributed to the badness of the stable, does not appear; but as it may be attributed to that cause with as much propriety as to any other, the defendant has no reason to complain, if he is made responsible. It was a want of ordinary care to have such a stable. Whenever it be doubtful whether ordinary care has been used or not, the presumption is against the bailee. If he does not rebut the presumption of a want of ordinary care, arising from the loss of the goods bailed, he is responsible.

It has been held, that when the goods of the guest were placed in a chamber and the key delivered to him, that the innkeeper was nevertheless responsible for their loss. (*Moor* 78, 158. *Cro. Eliz.* 285. *Sulk.* 18.)

Had therefore the stable been properly constructed, and the key delivered to the servants of the plaintiff, the defendant must have been held responsible. The innkeeper is regarded as exercising a public employment, all the duties

of which, must be rigidly enforced, to prevent the numerous frauds which they might have it in their power to practice with impunity.

The motion must therefore be discharged.

Justices *Colcock, Nott, Richardson* and *Gantt*, concurred.

Evans, Solicitor, (for *Ervin*,) for the motion.

McCord, (for *Dunkin*,) contra.

(a.) By the edict of the Roman Pretor, which with some variations has been adopted in Scotland, "the innkeeper, shipmaster, or stableman (*navatae, caupones, stabularii*,) is accountable, not only for his own faults and those of his servants, (which is an obligation implied in the very exercise of these employments,) but of the other guests or passengers; and indeed in every case, unless where the goods have been lost *damno fatali*, or carried off by pirates or house breakers. This edict so contrary to common rules was found necessary *ad reprimendam improbitatem hoc genus hominum*," *L. 1. s. 1. 8. naut. caup.* See *Erskine's Law of Scotland*, B. III. T. 1. s. 511. R.



BENJ. HAGOOD vs. JAMES HUNTER.

LEWIS FRAZIER vs. JAMES HUNTER.

There are three cases in which a magistrate may issue attachments; (1) where the defendant is about to remove his effects; (2) where he is removing out of the county privately; and (3) where he so absconds and conceals himself, that the ordinary process of law cannot be served upon him. (a.)

A recital of the affidavit in a writ of domestic attachment, in these words, were held insufficient, and on motion the court set the attachment aside, viz. "That the defendant was about to remove from and without the limits, or so absconds and conceals himself, that the ordinary process of law cannot be served upon him." The word *or*, renders the state of facts uncertain.

It seems necessary that the oath taken before granting a domestic attachment, should be recited in the writ; as it must appear upon the face of the process of all limited jurisdictions, that the case is within its bounds. (b.)

Tried at Pendleton, Fall Term, 1821.

THE Plaintiffs severally sued out domestic attachments against the defendant, issued by a magistrate on information made before him, (as recited in the attachment,) that the defendant "was about to remove from and without the *limits*, or so absconds and conceals himself, that the ordinary process of law cannot be served upon him." This recital was all the evidence that any information had been made; and the presiding judge granted a motion to set the attachments aside, on the ground that the information was not in conformity to the act, and the process founded upon it, therefore void.

A motion was now made to reverse that decision, on the ground,

1st. That the oath required by the act need not be recited.

2d. That the oath recited is sufficient.

Mr. Justice *Johnson* delivered the opinion of the court.

It is not necessary perhaps to the determination of this case, that the court should express any opinion on the first ground of the motion: as the fact on which it is predicated does not exist, for here is a recital of the oath. The authority relied on, (*M'Kinzie vs. Buchan*, 1 *Nott & M' Cord* 205,) does not support it. The question was not involved, and I am unable to discover any expression in the opinion of the court, from which such a conclusion can be drawn. In the case of *Truckelut vs. The City Council*, (*Ibid* 227,) the court decided that a process issued from the city court, must shew on the face of it that the case was within the jurisdiction of the court; and I apprehend the same rule will apply to the process of all courts of limited jurisdiction.

There are three circumstances under which a creditor on making oath of the fact, and complying with the other requisites of the act, has a right to the process of attachment of the character usually called domestic, against his debtor.

1st. Where he is about to remove his effects.

2dly. Where he is about to remove privately out of the county; and the

3rd. Is when he absconds or conceals himself, so that the ordinary process of law cannot be served on him. (1 *Brev.* 39-40.)

The first member of the recited oath does not state a case analogous to either of the three preceding. It does not state that he was about to remove his effects, or was removing *privately* out of the county, and concludes with the word *limits*, which may as well refer to his house, his plantation or neighborhood as to the county or district; and although the last member of the recited oath, is in conformity with the act in relation to the third case, in which an attachment will lie, it is rendered inefficient by its connection with the preceding sentence, through the means of the disjunctive conjunction *or*, and it becomes perfectly uncertain, which state of facts existed. If the former, he was not entitled to this process; for the rule is, that where a particular remedy is given by law, that remedy, and all the incidents appertaining to it, must be strictly pursued and complied with.

It is attempted to aid this defect by the legal presumption that the magistrate whose duty it was to require the oath prescribed by the act, had not issued the attachment without. He has recited in the attachment the oath which was taken before him, and there is no proof that there was any other, and it would be straining a mere legal presumption further than has ever yet been done, if it were suffered to countervail well attested facts. The law maxim is, *stabit præsumptus donec probetur in contrarium*, (*Peake* 111.)

The motion must be dismissed.

Justices *Huger*, *Nott* and *Colcock*, concurred.

Davis, for the motion.

Harrison, contra.

(a.) See *McKenzie vs. Buchan*, (1 *Nott & McCord*, 205.)

(b.) See *Sullivan vs. Fulton Steam Boat Com.* (6 *Wheat.* 430.) R.

WILLIAM GARRETT vs. JOHN STUART.

The only cases in which a party can aver against the consideration expressed in his own deed are when it is *illegal or fraudulent*; and a person cannot allege that a bill of sale was not given by him at the time the contract was entered into, but three or four weeks afterwards. Promises made on a consideration that is wholly past, without any new consideration moving to it, are void; but it *seems*, circumstances growing out of, and connected with the original contract, and an infinite variety of others, may constitute a new legal consideration. (a.) A party cannot at law, by parol testimony, shew a different consideration from the one expressed in a deed; but it may be admitted, it *seems*, to show a greater or less of the same character.

In *covenant* on a deed for breach of warranty of soundness of a negro slave, the measure of recovery is to the extent of the injury which the party sustains by the infraction of the covenant, whether it be partial or total, and must necessarily depend on the circumstances of the case.

In *special assumpsit*, for breach of warranty, it *seems*, that the consideration paid, is not *necessarily* the measure of damages, but, under particular circumstances, a jury may give more; although in most cases it would constitute the best evidence of injury sustained; yet in actions sounding altogether in damages, it *seems* that the measure of recovery must depend on circumstances.

Covenant and *general indebitatus assumpsit*, for money paid by mistake, or a consideration wholly failed, are not to be confounded; in the latter, the consideration paid and interest, is the measure of damages.

Tried at Laurens, Fall Term, 1821.

THIS was an action of covenant on a deed, in the form of a bill of sale, made by the defendant to the plaintiff, conveying title to a negro man slave called Spencer, and warranting his soundness; in which the consideration expressed was one thousand dollars, and the breach assigned was the unsoundness of the negro.

In addition to the evidence on the question of soundness or unsoundness, it came out that the bill of sale had not been executed at the time the contract was entered into, and the negro delivered, but at the distance of three or five weeks afterwards, and that the true consideration was another negro given by the plaintiff to the defendant in exchange, and not the sum mentioned.

The jury found for the plaintiff \$ 1000, and the defendant now moved for a new trial on the following grounds :

1st. The bill of sale being executed after the sale and delivery of the negro, was without consideration, and therefore void.

2d. Misdirection of the presiding judge in charging the jury that the only true measure of recovery was, the amount of the consideration mentioned in the deed, and interest thereon.

Mr. Justice *Johnson* delivered the opinion of the court,

As a general position, applicable to parol contracts, there is no doubt about the principle involved in the first ground of the present motion. Promises made on a consideration that is wholly past, without any new consideration moving to it, are void, as being without consideration. Circumstances growing out of and connected with the original contract, and an infinite variety of others unnecessary to the present case, may constitute a new legal consideration. This question, however, has no application to the present case. This action is founded on a deed, and the only case in which a party is permitted to aver against the consideration expressed, is where it is illegal or fraudulent. (*Bruce vs. Lee*, 4 *Johnson* 410.) The deed itself imports a consideration, against which the party is not permitted to aver, except in the two preceding cases. (*Peake* 119, *Randall's Ed.* 1 *Binny* 502-19. 4 *Johnson* 416.)

The arguments on the second ground of the motion have been directed principally to the question whether the party can be permitted to shew a different consideration from that mentioned in the deed? The general rule is, that parol evidence shall not be admitted to contradict or vary the obvious import of a deed; but I find there is great diversity of opinion in its application. In equity it seems that the consideration is always examinable; but by a reference to the cases collected and arranged in a note in (*Peake*, 112-117, *Randall's Ed.*) it will be seen that the

diversity of opinion in the law courts is so great as to lead to a confusion almost inexplicable. Legitimate considerations are either good or valuable ; and after some attention to the subject my mind inclines to the conclusion suggested by one of my brethren, that the distinction is, that where one of these is expressed, parol cannot at law be admitted to shew the other, but that it may be admitted to shew a greater or less of the same character. But this question, like the former, does not appear to me to bear on the present case.

This it will be recollected is the action of covenant ; an action sounding altogether in damages ; and the measure of recovery is to the extent of the injury which the party sustains by the infraction of the covenant, whether it be partial or total, and must necessarily depend on the particular circumstances of the case. Thus, in the case of *Eveleigh vs. Administrator Stitt*, (1 Bay 89,) the court, in an action on a warranty, say, that the value of negroes at the time the purchaser was deprived of the possession by title paramount, is the measure of damages ; but under particular circumstances the jury were justifiable in departing from it. (See 2 Nott & M'Cord 201.) So in the case of *Rose & Rogers vs. Beattie*, (2 Nott & M'Cord 538,) which was a special assumpsit, the court say, that the consideration paid is not necessarily the only measure of damages ; but that under particular circumstances a jury may give more ; and although the consideration paid might in most cases constitute the best evidence of the injury which a party sustained, yet in actions sounding altogether in damages, it seems to me to follow of necessity, that the measure of recovery must depend on the particular circumstances of the case. The error in this case arose probably out of confounding covenant with a general *indebitatus assumpsit*, for money paid by mistake, or on a consideration which has wholly failed ; then the general rule is as expressed in the opinion of the court below. The jury were doubtless influenced by this opi-

nion, and it furnishes, I think, a sufficient reason for sending the case back.

The motion is granted.

Justices *Colcock*, *Nott* and *Huger*, concurred.

Farrow, for the motion.

Downs, contra.

(a.) See *ante*, *Mussey vs. Craine*, 489.

ADMOR DARBY vs. FARROW.

Upon an agreement to rent a house and lot, out of the rent of which was "*to be deducted any repairs that may be done to the same*," the Court Held that the erection of a shed to the stable, a fowl-house, and — house were not repairs.

GORDAN vs. ARNOLD.

A miller's books, who swore to the original entries, which he made, are admissible to prove the quantity of lumber furnished from his saw mill to the defendant.

WM. MCGEE AND WIFE vs. JANE MCCANTS.

There is no prescribed form of words for a will, (a.) ; but if it be the intention of the testator to make a disposition of his estate, to take effect after his death, then it is his will, whatever may be the form. And there are several methods of coming at this intention ; (1) where it is so expressed on the face of the writing itself ; (2) where the paper is in the form of a deed, letter or memorandum, or in any other form, containing an actual disposition of his estate to take effect after his death, and though not a will in form, is so in its effects and operation ; (3) when the intention is doubtful and cannot be collected from the face of the paper, but by parol proof.

A letter containing these words, was held not to be a will, viz : "I am desirous to see you, and would be glad you could come down immediately, as it is my wish you should heir every thing I have at my decease ; but I fear unless you come quickly, I will be defrauded out of every thing by a person I once took to be a friend. I know you can

save the property for me, and all I desire is the use of it my life time, and it is more than probable that will not be long." "I would write more fully on the subject, but can explain every circumstance to you better when I see you." It was proved that the deceased did not suppose it would be his will.

Evidence that the deceased, on his death bed said "he gave all his personal property to his sister *Jane*;" and being asked if he wished any of his relations to have any of his property, replied, "no, that it was his sister *Jane's* and she might do as she pleased with it," was *Held* not sufficient evidence to establish a nuncupative will.

Tried before Mr. Justice *Johnson*, at Sumter, Spring Term, 1821.

SAMUEL McCANTS, died leaving a personal estate, which, if he died intestate, the parties were jointly entitled to inherit; but the defendant propounded in the court of ordinary, the following writing in the form of a letter, addressed to herself, as his last will and testament.

"*Dear Sister*, after wishing these few lines may find you well, this will inform you that I have been quite poorly and have been so all this spring, I would have come up to see you instead of writing, but am not able nor have I a horse able to carry me so far. I am very desirous of seeing you, and would be glad you would come down immediately, as it is my wish you should heir every thing I have at my decease; but I fear unless you come quickly, I will be defrauded out of every thing, by a person whom I once took to be my friend. I know you can save the property for me, and all I desire, is the use of it my life time, and its more than probable, that will not be long, I hope you will not fail in coming as soon as possible. Please remember me to *Wm. McGee*, and *Jane*, and the family. I would write more fully on the subject, but can explain every circumstance to you better when I see you. I remain, dear sister, your affectionate brother.

SAMUEL McCANTS."

John Presley, deposed that he wrote the letter at the request of the deceased, read it to him, and he approved it, and signed it in his presence. That his mind was at

that time in a sound state. He had not drank any that day. That the deceased brought his negroes to witnesses' house. That the defendant hired a waggon to move the negroes up to where she resided, and paid for it herself. She also paid the taxes on the property. That the deceased said he wished a maintenance out of the property and no more. That at his death, she (the defendant,) should have the property, and he would make it secure to her in any way that she pleased. The deceased, he said, was not present when he wrote the letter, but approved of it. On his cross examination, the witness stated that the deceased did not suppose the letter would be his will, but he appeared only to want a maintenance out of the property and at his death to be his sisters. The receipt for taxes, was taken in the name of the deceased. That the deceased, before he sent for the defendant, offered to mortgage one of the negroes to witness for provisions. That when the deceased had the letter wrote, it was not his intention that it should be his will, but it was his wish to make over his property to his sister as expressed in the letter. The inducement to write the letter, was that one *Snowden*, who had a deed of gift of the property and set up a claim to it, talked of going to the Western states and carrying it with him.

Mr. *Nesmith*, another witness, deposed that he knew nothing about the writing or sending of the letter, but that he knew the name of the deceased subscribed to the letter, to be his hand writing, and that the letter itself was in the hand writing of the witness *Presley*. That he understood the deceased was to leave his property to the defendant. Defendant bought provisions for the negroes when they moved up, and sent money by witness to pay the taxes. Witness went a part of the way with the waggon that moved them. There was no particular form in the delivery of the property. He saw the negroes go into the waggon that defendant had hired to move them.

Mr. *Heddeleston*, another witness, also proved the hand

writing of the deceased, and of *Presley*, who wrote the letter.

On a former occasion, the defendant had set up and attempted to prove in the court of ordinary, a verbal will made by the defendant, which was rejected by the court; and the following evidence taken on that occasion, was by the consent of the parties, received in evidence on this trial:

Thomas Pringle, sworn, and deposeth, that *Samuel McCants* said he gave all his personal property to his sister *Jane*. He (the defendant,) asked the said *Samuel McCants*, if he wished any of his property left to any of his relations; he said no, all was his sister *Jane's*, and she might do as she pleased with it: that it was done on the eighth of August, and he died fourteen or fifteen days after. It was done in the house he resided in, and that he had resided in that house ever since last March, and done on his death bed in his last sickness; that he committed the same to writing on the 24th day of August, the day after he died. That when he was sent for, it was with an idea or under the impression that it was by the request of the testator, and the boy said so, as well as he recollects. He (the deponent,) thought he would die at that time. On cross examination, he said that the testator did not call on him particularly to bear witness. When he went in, he sat in a chair by his bed side, and asked him if he wished to dispose of his property. He said yes, (and related as above,) that at the time he was of sound and disposing mind, as he usually had been, he was very low at the time, and that if ever he was able to make a will, he was at that time.

"*J. A. Spears*, sworn and deposeth, that *Samuel McCants* said that he gave his personal property to his sister *Jane*; he was asked by *Mr. Pringle*, if he wished any of his relations to have any of his property, he said no, that it was his sister *Jane's*, and she might do as she pleased with it. When he was sent for, the boy *Daniel*, told him that *Mr. Samuel McCants* sent for him to go there; that it was on the eighth of August, and that he died about fifteen days

after ; that himself and the other two witnesses committed it to writing on the Monday after his death, and he died on Sunday morning. He, (the defendant,) spoke to Mr. *McCants*, in a friendly way when he went into the house ; that it was done on his death bed, in the house where he, (the testator,) resided ; he heard Mr. *Pringle* ask the testator if he wished to dispose of his property. He said yes. On cross examination he said the fellow or boy did not tell him that it was to witness his will, nor neither did he tell Mr. *McCants*, that he had come, nor Mr. *McCants*, did not tell him, to bear witness ; that he could speak very well.

“ *J. Mordecai*, sworn and deposeth, that he was there when Mr. *Pringle* asked Mr. *McCants*, if he wished to dispose of his property. He said yes ; he wished his sister *Jane* to have it all. Mr. *Pringle* asked him the other question stated above, and he said no, it was all hers. He did not know the exact date ; but that he died about the twenty-first ; that it was on his death bed in the house where he resided ; that himself and the other witnesses committed it to writing on the twenty-fourth of August ; that he appeared to be as rational as he had ever seen him. On cross examination, he said he went to Mr. *McCants* house ; negro *Daniel* came for him ; he cannot say that the testator sent for him ; that the testator said nothing until he was asked ; he had no idea why he was sent for, until he came there ; the negro said his mistress sent for him ; he thought the testator was a man of weak mind, but was as rational as ever he was.”

On this evidence, the ordinary pronounced in favour of the writing as testamentary, and approved of it as such.

From this decision, an appeal was brought up to the circuit court, when an issue was made up to try the question *devisavit vel non* ; on which issue, the jury under the direction of the court, found that the said writing was not testamentary ; and the defendant now moved for a new trial.

Mr. Justice *Johnson* delivered the opinion of the court.

There is no prescribed form for a will, but like every thing else, it possesses some ingredients which its peculiar character renders indispensable. It is, says *Bacon*, "a just and complete declaration of a mans mind, or last will of what he would have done with his estate after his death; or according to some, a will is a declaration of the mind either by word or writing, in disposing of an estate, and to take effect after the death of the testator. (7 *Bacon. Tit. Wills & Test.* 299. A.) And the true question in every case, is, what was the *mind* or intention of the testator, and how did he intend that the paper should operate? If as a disposition of his estate, to take effect after his death, then it is his will, whatever may be the form. There are several methods by which we come at this intention.

1st. When it is so expressed on the face of the writing itself.

2nd. When the paper is in the form of a deed, letter or memorandum or in any other form, containing an actual disposition of his estate, to take effect after the death of the testator; and though not a will in form, is so in its effects and operation. (4 *Vesey* 565. *Millegre vs. Lamar*, 4 *Equity Rep.* 617.)

3rd. Where the intention is doubtful and cannot be collected from the face of the paper, but by parol proof. (2 *Vesey* 441. *Phillemore* 32, 345.)

It is not pretended that this case falls within the operation of either of the two first rules. It does not profess to be a will, nor does it contain any actual disposition of the estate of the deceased, and it is only necessary further to consider whether the parol evidence sufficiently proves his intention that it should operate as a will.

It will be recollected that the letter was not written by the deceased himself, and that the object was to prevail on the defendant to take possession of the property to prevent *Snowden* from carrying it away; and as an inducement to her to engage in it, he declares that it is his *wish*

that she should *heir* his property at his death. I attach no importance to the word *wish*, nor to the incongruity of the word *heir*; as they were terms selected by the writer, obviously without regard to propriety, to express what he supposed to be the intention of the testator, and which the witness said, neither the testator nor himself had any idea was to operate as a will.

The evidence collected on the attempt to establish a verbal will, and read on this occasion by consent, is, I think, equally unsatisfactory. They prove, it is true, the repeated declarations of the deceased, that it was his intention to leave his property to the defendant; but they prove no actual disposition in a manner that could operate as a will; nor is there the most distant allusion to this paper in any subsequent declaration, which fell from him; and it is already shown, that there must be an act of disposition; and I trust I shall not be called on, to prove that the intention to do the act, is the act itself.

The motion is discharged.

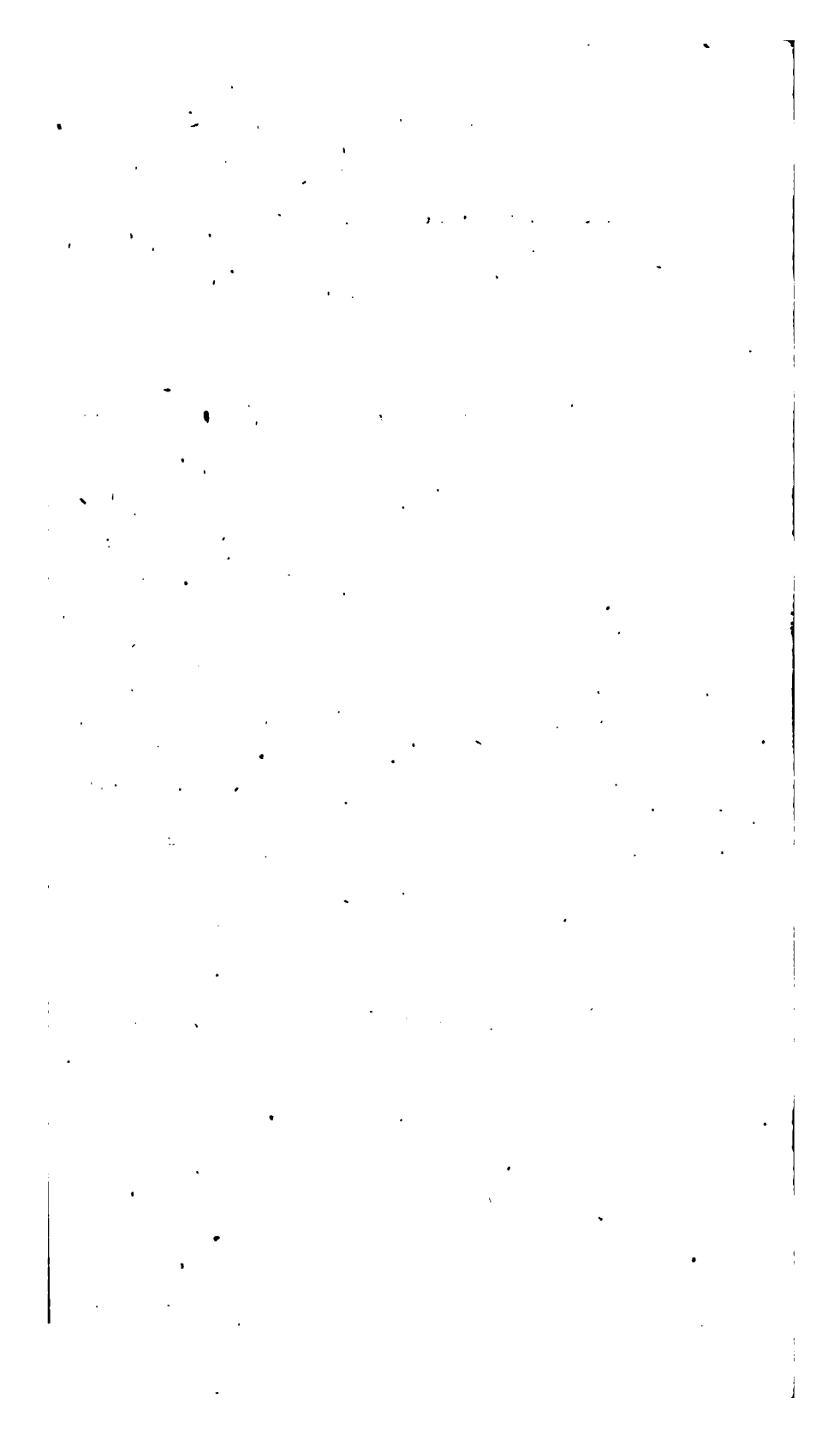
Justices *Colcock*, *Nott*, *Richardson* and *Huger*, concurred.

Mr. Justice *Gantt* dissented.

De Saussure, for the motion.

Miller, contra.

(a.) *Vide ante*, *White vs. Holmes*, 438.



CONSTITUTIONAL COURT

OF

South-Carolina, May Term, 1822—Columbia.

JUSTICES PRESENT AT THIS TERM,

ABRAHAM NOTT,
CHS. J. COLCOCK,
DANIEL E. HUGER,

RICHARD GANTT,
DAVID JOHNSON,
JOHN S. RICHARDSON.

STATE *vs.* JOHN ALLEN.

The right of polling the jury is not attached to either the plaintiff or defendant, (in state as well as civil cases.) It is a mean to which the court sometimes resort, to ascertain if the jury are agreed on their verdict; but when the court is fully satisfied with the verdict, by other more accustomed means, it will not resort to it. (*a.*)

In prosecutions for libels in this state, though not by the common law of England, the intention with which the publication was made, as well as the fact of publication and truth of the innuendoes, are involved in the general issue, and the whole case, *law as well as fact*, is resolved by a general verdict.

Libel.

THE defendant was indicted for a libel in Fairfield district, in the Fall Term of 1820. The case was then traversed, and not tried before the Spring Term of 1822. After the jury had been sworn to try the case, the defendant's counsel moved to quash the indictment, on the ground that the prosecutor had been one of the grand jury, who found the bill. On investigation it appeared that although the prosecutor had been one of the grand jury in the Fall Term of 1820, he was not one of them when the bill was found, and that his name had been inserted by

mistake in the indictment. The motion was then refused, and the case went to the jury.

Judge *Johnson*, in his charge, stated that in prosecutions for libels, it was not within the province of the jury to decide on the intent of the defendant, or whether the publication was libellous or not; but that the only questions for their consideration, were,

1st. Whether the defendant was the publisher of the piece charged in the indictment, and

2dly. Whether the inuendoes were true?

That the intent was an inference of law, to be decided by the court, after the fact of publication, and the truth of the inuendoes had been found by the jury, and that a general verdict would amount to no more than finding the fact of publication, and the truth of the inuendoes.

The jury returned a verdict of guilty; when the defendant's council requested permission to poll the jury; which was refused.

The motion to quash the indictment was here renewed, on the grounds taken below. And a motion for a new trial was submitted on the following grounds:

1st. For misdirection of the judge, in his charge to the jury, that they were not to decide upon the intent of the defendant, in publishing the hand bill.

2dly. That the defendant had a right to poll the jury.

Mr. Justice *Huger* delivered the opinion of the court.

The motion to quash the indictment must be dismissed for the reasons assigned by the circuit court.

Before I proceed to consider the first and important ground, on which the motion for a new trial is submitted, I will briefly observe on the second, that in the case of *Martin vs. Maverick*, (*ante* 24,) recently decided by this court, it was ruled that the right of polling the jury did not attach to either party, plaintiff or defendant; that it was a mean to which the court sometimes resorted, to ascertain if the jury were agreed on their verdict; but that

when fully satisfied of this fact, by other and more accustomed means, it would not be resorted to.

The first ground presents a question which formerly excited much interest in England, but one which I had thought long since settled in this state. I find however on investigation, that no decision directly on the point, has been made by this court, however uniform may have been the decisions on the circuit. I shall therefore proceed to enquire,

1st. Whether according to the common law of England, the juries are confined to the fact of publication, and the truth of the innuendoes? And if such be the case, whether that rule is of force in this state?

That a difference of opinion existed in England as to the rights of jurors on this subject, is very apparent from the parliamentary and judicial history of that country. In the senate and at the bar, as well as in the public prints, a most decided opposition was kept up for years; and it was only terminated by the statute of the 32 of *George III*, which restored to jurors, the right of deciding upon the intention as well as the fact of publication, and the truth of the innuendoes. As this statute, however, was not passed until long subsequent to the separation of the United States from Great Britain, its provisions are not binding here; but the law as it stood anterior to that statute, must be our rule; unless controlled by other causes.

That the rule as laid down by the circuit court was the law of England, prior to the time of the statute, is, I think, abundantly evident. As early as the year 1731, *Lord Raymond*, in the case of the *King vs. Franklin*, distinctly recognized it as settled doctrine. His words were, there are three things to be considered, whereof two by you, the jury, and one by the court.

The first is, whether the defendant is guilty of the publication or not?

The second, whether the expressions refer to his present majesty or his principal officers, and are applicable to them or not?

The third does not belong to the office of the jury, but to the office of the court.

The intention was by him regarded, as an inference of law.

The same doctrine was recognized by Lord Chief Justice Lee, in 1752, in the case of the *King vs. Owen*, (10 *St. Tr. App.* 194.)

In the celebrated case of the *King vs. Wilkes*, in 1764, for publishing the 45th No. of the *North Britain*, the verdict of printing and publishing, was regarded as a general verdict of guilty, (4 *Burr*, 2527.)

Lord Mansfield, in the case of *Woodfall*, for publishing *Junius*, (5 *Burr*, 2661,) stated that "*guilty of printing and publishing*, where there is no other charge, is *guilty*; for nothing more is to be found by the jury." In this case, he observed that this direction, though often given, with an express request from him, if any doubt existed as to its correctness, that the court might be moved upon it, was never complained of.

In the case of the *Dean of St. Asaph*, tried in 1784, Mr. Justice Buller laid down the same doctrine, which, on an appeal to the bench of judges, was fully and unanimously confirmed.

In the case of the *King vs. Sockdale*, as well as in that of the *King vs. Withers*, Lord Kenyon supported the same doctrine, (3 *Tem. R.* 428.)

If to authorities so high, any additional support be necessary, it is to be found in the reply of the twelve judges of England, to the questions put to them by the House of Lords in 1783; when they had under consideration the Libel Bill. The question was, "whether on the trial of an information, or indictment for a libel, is the criminality or innocence of the person, set forth in such information or indictment, as the libel, matter of fact, or matter of law, where no evidence is given for the defendant?" The answer was, "matter of law."

In opposition to decisions so uniform, and commanding the opinions of jurists at the bar and in the senate.

however respectable, cannot be regarded as authoritative. They may indeed shew what the law ought to be; but to the courts alone we can resort, to ascertain what the law is. That this rule is at variance with the the general principles of law, is not denied. In every other case, without exception, where the general issue be joined, a general verdict resolves both law and fact. And although it be true as a general maxim, that "*ad questionem legis respondent iudices, et ad questionem facti respondent juratores*," yet where law and fact are blended, as they must be in the general issue, it is impossible to decide the one without the other, and therefore in all such cases, the juries, if they decide at all, must *ex necessitate* decide the law as well as the fact. Libels, however, are said to differ so much from all other criminal offences, as to justify a departure from the general rule of proceeding. Intention, which is the very essence of crime, is said in all other cases to be inferred alone from facts, which are within the province of the jury; but that in the case of libel, the intention is an inference of law from a written instrument; the construction of which is always within the province of the court.

But there is a manifest distinction between the purport or meaning of an instrument in writing, and the intention, or *quod animo*, with which that instrument was written. The most harmless words in their accustomed sense, may, under peculiar circumstances indicate the most malicious disposition, and be productive of infinite mischief; whereas words of a very different character may be uttered without malice, and from circumstances be perfectly harmless: and whether they be the one or the other, is a fact which can only be inferred from other facts, as time and place, &c. To have written at one period of a man in France, that he was a royalist, would have been malicious and injurious; whereas the same epithet would now be regarded as harmless, if not complimentary. In civil cases, the intention or purport of the instrument, is the only subject of enquiry. In criminal cases, the *quo animo*, the

disposition of mind with which the instrument was written, is the question. The first is an inference of law, and properly belongs to the court ; the last is an inference of fact, and ought to belong to the jury. This distinction is preserved in all cases of forgery. The jury are then not limited in their enquiry to the simple fact of execution, but determine the *quo animo* with which it was done. It was not, I apprehend, because jurors are less qualified to infer from circumstances, the intention with which a libel had been published, than that with which a note had been executed, or that intention was not as essential to the constitution of a libel as a forgery, that the law of England has reserved the first to the judges and given the other to the jurors. In the peculiar form of the British government, I think is to be found the reason of the exception. Composed of three distinct orders, King, Lords, and Commons, much regulation was required to preserve each in its respective sphere. The history of England is scarcely more than the history of an almost perpetual contest for power, between these different orders. Each in turn has gained the ascendancy ; but neither has been able to destroy the other. The patronage of the king, the wealth of the nobility, and the physical power of the commons, acting in different combinations, and under different circumstances, have hitherto preserved that balance of power, on which the preservation of the government is supposed to depend. In these different contests, each order resorted to all the means it possessed for aggression or defence. Perhaps the most formidable power which can be arrayed against prerogative, is the press. If unrestrained, its success would seem to be almost inevitable. So formidable was this power regarded by all parties, and so vitally connected was it supposed, with the doctrine of libel, that we find the friends of prerogative, among whom have always stood pre-eminently distinguished, the judges of England, invariably contending for the rights of the court, and the friends of the commons, as invariably contending for the rights of juries. If to this peculiarity of the British

government, the rule in question is properly traced, it would only be consistant with a very common maxim of the common law itself, *cessante ratione cessat et ipsa lex*, to declare it not of force in this state, where we have but one order, and that order the people. But on this point, the act of the legislature, which makes of force the common law in this state, is explicit. *It is of force, only so far as is consistent with our constitution, customs and laws.*

In the case of the *State vs. Lehre*, this point did not necessarily arise, but the court incidentally noticed it and observed, that they were unanimously of opinion that the intention with which the publication was made, as well as the fact of publication and truth of the inuendoes, was involved in the general issue; and that the whole case, law as well as fact, was resolved by a general verdict; and such is now the opinion of this court.

The motion therefore for a new trial, must be granted.

Justices *Colecock*, *Richardson*, and *Gantt*, concurred.

Mr. Justice *Nott* :

I concur with this decision, because I think it is consonant with the principles of the common law.

Nott, for the motion.

Clarke, solicitor, contra.

:

PARROT & FELTH vs. SAM. W. GREEN.

Where the plaintiff brings two summary processes upon two distinct notes, against the same defendant, the court will not consolidate them if the amount of both notes exceed the summary jurisdiction.

TWO summary processes were brought, one on a note for \$44 29 1-2; the other on a note for \$47 68 1-4. The defendant moved for an order to consolidate; which was granted.

A motion was now submitted to reverse that order.

Mr. Justice *Huger* delivered the opinion of the court.

In the case of the *Planters and Mechanics Bank vs. Moses Cohen*, (2 *Nott & McCord*, 440,) it was decided that the court would not grant an order for consolidation, unless satisfied that no injury was to result to the plaintiff. In the case before the court, a consolidation must necessarily produce delay, as the amount of the two notes is beyond the summary jurisdiction of the court, and delay is always such an injury to the party complaining, as should prevent the court from ordering a consolidation.

The motion must therefore be granted.

Justices *Nott* and *Gantt*, concurred.

Mr. Justice *Colcock* :

I dissent ; for this ground would prevent all consolidations, and because it is a matter of discretion in the judge, if the cases from their legal character can be joined.

Noble & Wardlaw, for the motion.

——— contra.

THE STATE vs. FRANCIS B. O'DONALD.

Where on an indictment for a riot, against the defendant and two others named, with "divers other persons, to wit, to the number of five," without alleging that the five others were unknown, or setting out their names; and the grand jury found a true bill, only against the defendant and one other, to which the defendant pleaded guilty, the court arrested the judgment.

Tried at Camden, Spring Term, 1822.

A BILL of indictment was preferred against the defendant and two others for a riot. It charged that they, together with "divers other persons, to wit, to the number of five," committed the offence, without alleging that the

five others were unknown or setting out their names. The grand jury found a true bill, only against the defendant, and one other. The defendant pleaded guilty, and a motion was now made to arrest the judgment; the grounds of which present the single question, whether it was or was not necessary to set out the names of the others if they were known, or to charge in the indictment that they were unknown, if such was the fact?

Mr. Justice *Johnson* delivered the opinion of the court.

Notwithstanding the complaints that have been made against the strictness required in criminal proceedings, as tending to facilitate the escape of offenders, all must agree that to a certain extent it is indispensable; nor will it be denied that it is necessary to the purposes of justice, that the party accused should be fully apprised of the nature and identity of the offence, for which he is called to answer. He ought to be protected from subsequent prosecutions for the same offence, and the court ought to be enabled to judge from the record, what the offence is, and to apply the judgment and punishment, which the law prescribes.

Upon this principle, it is necessary to set out the name of the person against whom the offence was committed, not as a substantive part of the offence itself, but as a circumstance descriptive of its identity; and notwithstanding it is from necessity dispensed with when the name is really unknown, yet it is so steadily adhered to in the English courts, that where on the trial of an indictment for larceny, which laid the goods stolen as the property of a person unknown, the owners name was developed, the prisoner was discharged, and a new bill of indictment preferred, setting out his name. (1 *Chitty, Crim. Law*, 212.)

For the same reason, the names of third persons, if they be necessary to the consummation of the offence, or constitute a necessary part of its description, should, if known, be inserted; with regard to which, the same strictness is required as in an indictment against an accessory, stating contrary to the truth, that the principle was unknown, the

court directed the prisoner to be acquitted. (1 *Chitty, Crim. Law*, 212.)

This case is, I think, precisely analogous to the present; and due uniformity of the precedents, with regard to this allegation, leave no doubt on my mind as to the correctness of the principle; for such is the perfection of the English system of pleading, to which we profess to adhere, that not a single term is retained, which is not necessary to some object.

It may be objected, however, that notwithstanding the indictment does not allege that the names of the five others were unknown, it may be implied from the circumstances that they are not mentioned. In criminal proceedings, nothing is to be taken by intendment. The charge must be sufficiently explicit to support itself; for no latitude of intention can be permitted to include any thing more than is expressed. (2 *Burrow*, 1127. 1 *Term*, 69. 1 *Leach*, 249.)

The application of these rules to the present case is manifest. The grand jury have found a true bill, against only two of the persons that are named, and three are necessary to consummate this offence. Five others are spoken of, but not named, nor does the indictment charge that they were unknown. The first is necessary as a constituent fact of the offence, and the second, as a part of its description and identity. The indictment is therefore bad and the motion must be granted.

Justices *Richardson* and *Gantt*, concurred.

Carter, for the motion.

Evans, contra.

HUGH MAXWELL ADS. JAMES CARLNE.

The act of 1803, to authorize office copies of grants to be given in evidence, includes as well office copies, certified by the *deputies* of the

secretary of state and of the surveyor general, as by those officers themselves.

Tried before Judge *Colcock*, Abbeville, March Term, 1822.

THIS was an action of trespass to try title, in which the plaintiff produced a plat and grant to *James Campbell*, for 82 acres of land, dated 5th May, 1800, then a conveyance of the land from *Campbell* to plaintiff, of 18th Jan. 1820, which was proved. He proved a trespass and rested his case.

The defendant produced a copy grant of 1000 acres, embracing the above 82 acres, dated 21st July, 1775, to *Sir Edward Head, Bart.* under the usual affidavit, that the original was lost; which grant was certified "to be a true copy from grant book, &c. by *James M. Cowdry*, deputy secretary of the state," &c. which was rejected by the court, because not certified by the secretary *himself*; and also a plat of the same land was rejected; because certified in the same way by the *deputy* surveyor general.

The court, however, permitted the plat to go to the jury merely as a designation of the lines claimed by defendant, who proved a possession, constantly from the time he settled on the land in —, till the present time, (at least 18 years.)

The judge, however, charged the jury, that they *must* find for the plaintiff; because he had proved 9 or 10 years cultivation of the land (he did not live on it) within his grant; and because the defendant did not produce a grant for the quantity he claimed.

There was a verdict accordingly for 82 acres, and \$4 25 damages.

A motion was now made for a new trial, on these grounds:

1st. Because the judge ought to have admitted the *copy grant* and *plat*, offered by the defendant; they being legally certified.

2nd. Because his honor charged the jury that they *must*

find for plaintiff, when defendant had proved a continued possession for 18 years ; and because defendant gained a title to the land for ought that appeared, even after plaintiff had failed to prove an actual possession of the land in in himself ; to wit, after the year 1811.

Mr. Justice *Richardson* delivered the opinion of the court.

The question submitted to the court is, whether under the act of 1803, to authorize office copies of grants to be given in evidence, the copy of the grant and plat, must be respectively certified by the secretary and surveyor-general, or may such certificate be given as in the case before us, by and in the name of their respective *deputies* ? The act declares that "it shall be lawful, &c. to produce in evidence a copy, certified by the secretary of state and surveyor-general, of any grant and plat," &c.

To determine whether the words "secretary and surveyor-general," may include their deputies, we must turn to the constitution erecting their offices; which declares (sec. 2, art. 10,) "that the secretary of state and surveyor-general, shall hold their offices both in Columbia and Charleston. They shall reside at one place and their deputies at the other."

Here we find a deputy secretary and surveyor-general, expressly recognized and required ; to reside, the principal at one office, and his deputy at another. For what purpose ? Assuredly to do the business of his particular office. The deputy is as plainly noticed as the principal, and regarded as an officer doing the duties of his office at Charleston or Columbia.

Where the act uses the words "secretary and surveyor-general," these words must be taken in their comprehensive sense, i. e. to mean the deputy as well as the principal ; otherwise they would not embrace acts to be done at both offices, but those only, where the principal secretary resided. The act is a remedial one, and the object in view is to be regarded. This was to permit office copies of

grants to be given in evidence, whether the originals or records were kept at Charleston by the deputy secretary, or at Columbia by his principal.

To confine the word secretary, in such a case to its most restricted import, would, in my judgment, be little less than confining it to the secretary in office, at the time of passing the law.

The practice too, has been in conformity to the construction here adopted.

The motion is therefore granted.

Justices *Nott, Huger, Gantt* and *Johnson*, concurred.

McDuffie, for the motion.

———, contra.

JAMES HUGHES *ads.* JACOB B. BANKS, *by his next friend*, ELIAS BANKS.

An express warranty of title under seal does not exclude an implied warranty of soundness. (*a.*)

In an action of *special assumpsit*, to recover back the price paid for any property, which proves unsound, there is no necessity to prove a return of the property or any rescission of the contract; if general *indebitatus assumpsit* be the action, it is then necessary. (*b.*)

Tried at Abbeville, March Term, 1822, before his honor
Judge Colcock.

THIS was an action of assumpsit, brought to recover back the price of a negro woman Rachael, sold by the defendant to the plaintiff, on the 8th October, 1819, on the alleged ground that the negro was unsound at the time of sale. There was a bill of sale of the above date, under seal, warranting merely the title.

The principal evidence relied upon by the plaintiff, was that of Dr. *Hammond*, who proved that he was called in to attend the woman on the evening of the 26th of November, 1819, (about seven weeks after the sale,) when she

was excessively ill, and died on the next evening. That he examined her, and was under the impression that she died with the *lues venerea*. His attention was directed to that disease from hearing the family say that she formerly had it; otherwise he confessed *he might not have formed an opinion of what disease she did die*. Another reason however he gave, was that there appeared to be a slight discharge from the *vagina*, which he thought was venereal. That she had no swelling of the groin, enlargement of the throat, buboes, chancres, or any other *external* appearance attendant usually on such a disease.

The defendant proved by *Willis Palmer, Michael Crozier, Jesse Campbell, Singleton Hughes*, and others, three of whom were *Hughes'* overseers, and one of them *the very year of the sale*, and constantly in the habit of seeing her, and superintending her employment, that she was sound, and one of the best hands of *Hughes'* whole gang of female slaves. That she had been perfectly well, and a valuable worker for ten or twelve years at least. That on the sale *Hughes* gave *Banks* the choice of his whole gang; and that after the sale, *Banks* expressed himself at different times perfectly satisfied with his bargain. Indeed the defendant proved clearly that the negro was not only fat, sound and hearty after the sale, but was so even within two weeks of her death. He proved by *Collins* and others, that he was an honest and fair man in all his dealings; by *Isaac Hawes* and *John Carr*, that after said sale and death of said negro, *Banks* acknowledged in their hearing and presence, that his wife pressed him to sue *Hughes*, but he said that it would be *unjust to make his neighbours pay for his misfortunes*.

Doctor *Davis* declared that the two diseases which Dr. *Hammond* thought were the same, were as distinct as possible; but admitted that *Hammond's* opinion was supported by doctors *Huxter* and *Thomas*, viz. the gonorrhœa, (with which he supposed the negro was afflicted, and which was proved by one of the witnesses,) and the *lues venerea*. The one was local, the other general; and so

agreed all the latest writers and physicians. That altho' the latter disease might be suppressed or lie dormant for a considerable time, yet it would shew clear and unequivocal *external* symptoms, such as buboes, chancres, blotches, enlargement of the throat, &c. *before death could be the consequence of such disease.* That he conceived it impossible that a human being should be well and hearty two or three weeks before, and be taken off by this disease; the more especially without any of the external appearances before mentioned.

Doctors *Arnold* and *Presley*, were sworn and fully confirmed *Dr. Davis'* statement in every material point. The former supposed that there might be one case, in which a patient might die without any such external appearances, and one only, and that was, when a node might be formed on the bone near the brain, so as to press it, and produce a sleepy or comitose state; but this was a slow, gradual formation, and would shew itself in sickness, debility, &c. long before death. That a negro could not have been well and capable of work, and taken off by this disease in two or three weeks after. Even *Dr. Hammond* admitted that this complaint could not have carried off a person, healthy a short time before; and it was not pretended, that the woman had any other disease at the time of sale. *Dr. Presley* said that the negro could not have died, from *Hammond's* own statement, which he heard given in, and both the other physicians agreed with him, from the same undisputed statement. No other physician but *Hammond*, was called in to visit the patient. It was proved by plaintiff, that *Hughes* acknowledged that the woman had had the venereal many years, (12 or 14) before, but had got entirely well; although some of her children had cutaneous eruptions, which were easily cured; being a thing of nothing, as he expressed himself.

The jury brought in a verdict for \$600 and costs.

A new trial was moved for, on the following grounds, viz :

1st. Because there was a bill of sale, under seal, accep-

ted by the plaintiff, which rebutted the idea of any *implied* warranty, and murged the remedy by assumpsit.

2nd. Because there was no proof of a recision of the contract by a return or a tender of the property, though the parties lived near neighbours.

3rd. Because his honor gave it as his decided opinion to the jury, that Dr. *Hammond's* views of the nature of the two diseases was correct, and that they were the same against the united opinion of the other physicians, and of the most approved and latest authorities on the subject.

4th. Because even Dr. *Hammond* himself, admitted that a person well and active, (as was proved in this case,) two or three weeks before, could not have died of this disease.

5th. Because the verdict was against the whole weight of positive evidence given in, both of *medical* men and others.

Mr. Justice *Colcock* delivered the opinion of the court.

The court has repeatedly decided the first and second grounds taken in this case. An express warranty of property does not exclude a responsibility on the implied warranty of soundness. (*Tunno vs. Fludd*, and a number of other antecedent cases.)

In an action of special assumpsit, to recover back the price paid for any property which proves unsound, there is no necessity to prove a return of the property, or any recision of the contract. If general *indebitatus assumpsit* be the action, it is then necessary as in the case of *Fowler & Williams*.

The third ground cannot avail the defendant ; for it is competent for a judge to express an opinion on the facts of any case ; and in the present instance the case did not in any wise depend on the fact on which the presiding judge expressed his opinion.

The fourth ground assumes a fact as proved, which was one of the facts submitted to the jury, and is negated by their verdict.

On the fifth and last ground, I can only repeat the lan-

guage which has been so often reiterated by this court; that where there is evidence on both sides, the court will not interfere with the verdict, and here, independent of the evidence of Dr. *Hammond*, there were circumstances which proved conclusively, the unsoundness of the woman.

The motion is therefore refused.

Justices *Nott, Richardson, Huger, Gantt* and *Johnson*, concurred.

McDuffie, for the motion.

Noble, contra.

(a.) See *Wells vs. Spears*, ante 421.

(b.) See *Wharton vs. O'Harra*, 2 *Nott & McCord*, 65. R.

FREDERICK BEITZ, ADM'R vs. JAMES FULLER.

The acknowledgments of one of several makers of a joint and several promissory note, that the debt is still due, is sufficient to take the case out of the statute, as to the others; and such an acknowledgment may be given in evidence, in a separate suit against any of the others, and will be conclusive, unless counteracted by opposing testimony.

Tried before Mr. Justice *Colcock*, Laurens district, Spring Term, 1822.

THIS was an action on a note signed by the defendant, one *Holt*, and another.

Plea, statute of limitations.

The note was dated in 1808. The last payment made on the note, was in 1814. It was proved that a settlement took place; that is, a calculation was made by *Holt* and the plaintiff, in 1821, and the balance stated on the back of the note. The witness also said that *Holt* acknowledged the note to be due, and promised to pay it. A decree was given for plaintiff, and a motion was now made to set it aside and for a new trial, on the ground that the decree was contrary to law.

Mr. Justice *Colcock* delivered the opinion of the court.

The statute of limitations operates on the supposition, that the debt is paid. Any thing, therefore, which shows satisfactorily that the debt is still due, is sufficient to prevent its operation. Now an acknowledgment of the maker, or one of them, is certainly for the most part, the best evidence which the nature of the case admits, and although it may occasionally be susceptible of objection like all other evidence, it must be conclusive if not counteracted by opposing testimony. The authorities on this point, are very satisfactory, (10 *Johnson*, 35. 15 *Johnson*, 3. 2. *Const. Rep.* 111.) But it is urged in a written argument furnished by defendant's counsel, that the circumstances of the case vary it from the general doctrine. First, that the defendant in this case was a mere security, and *Holt*, who acknowledged the debt to be due, was the principal and insolvent, and that this is a joint and several note. These grounds were not urged below, but they cannot avail the defendant. The two facts of his being the principal and being insolvent, could only go to his credit; and I think the first is calculated to give support to his evidence, for being the principal, he would best know whether the note was due; as in the usual course of business he would first have been applied to; and if the others had been made to pay it, they would no doubt have made some application to him. His being insolvent, could not be a reason why he should speak falsely on the subject. His insolvency might protect him for the time, but by reviving the debt, he subjected himself to future liability if he should be more prosperous, and every man has a hope that in future he will succeed.

As to the last objection, of its being a joint and several note, it is equally inefficient; for although he is so bound, he may be sued jointly, and is in any event jointly liable. As a general rule, where one joint and several obligor is made to pay the whole, he can compel his co-obligor to contribute; and in the case before us, the defendant will have that benefit, even admitting it to be proved that *Holt*

is insolvent. Authority is not wanting in support of this position, in 2 *H. Black.* (in the case of *Jackson vs. Fairbanks*,) 340, the assignees of one who was jointly and severally bound with others, paid a dividend on a note, which was barred; ruled sufficient to take it out of the statute. This payment was made in consequence of the acknowledgment of the bankrupt co-obligor.

The counsel for defendant in the written argument, relies on the case of *Haskell vs. Hart & Kean*, (2 *Nott & McCord*, 160) for support; but as far as the case goes, it certainly operates against him. The acknowledgment of *Hart*, was permitted to go to the jury, but it was limited and referred to other circumstances, which when developed, tended to rebut any presumption that the debt was still due, which may have arisen from the acknowledgment of *Hart*, that he had not paid it. In 2 *Selwyn*, 154, an acknowledgment by one of several makers of a joint and several promissory note, was holden sufficient to take it out of the statute against the others; and that such an acknowledgment might be given in evidence in a separate action against any of the others. See *Douglass* 657, *Whitcombe vs Whitney*, which I have examined, and it is directly in point.

The motion is discharged.

Justices *Nott*, *Richardson* and *Huger*, concurred.

Simpson & Dunlap, for the motion.

Creswell, contra.

CHARLES HAYNES vs. ROBERT GAULT.

An owner of land, through which a water course runs, is entitled to an action against a person for diverting the water from his land.

Tried before Judge *Johnson*, Union, Spring Term, 1822.

THIS was an action on the case, against the defendant for diverting a water-course from its ancient channel. It

appeared that a creek was the boundary between the plaintiff and defendant, so that each was entitled to the use of the water, or to the center or half; and on that part of the creek where the stream was in common between the parties, there was a mill seat worth \$1000; and before the defendant built his mill on his side of the creek, the plaintiff had offered to take a fair price for his part of the shoal on that part of the creek where it was in common. But this proposition the defendant refused to accede to; and built a mill on his side, at some distance from the bank; and going above the shoal in which the plaintiff was interested, made a dam adjoining to plaintiff's bank, and cut a ditch by which the water was turned from the ancient channel to the mill, to the great injury of the plaintiff; as the water did not again fall into the old channel, until it went below the plaintiff's shoal.

On this testimony the court ordered a nonsuit. From which the plaintiff appealed, and gave notice that he would move this court to set aside the order of the presiding Judge, on the following grounds, viz.

1st. Because the right of the plaintiff to recover was clearly made out, and the case ought to have been submitted to the jury.

2d. Because the plaintiff had a legal right to sue the defendant for the wrong done him; although they might be considered as tenants in common.

3d. Because the case made for the plaintiff by the evidence, was not a case of *damnum absque injuria*.

Mr. Justice *Richardson* delivered the opinion of the court.

No rule of law can be clearer than that for every wrong done by one man, to the property or legal rights of another, there is a remedy by action of law. Now that a freeholder has a right to the use of a stream of water running through his land, is equally clear. (See 3 *Blks. Com.* 218. 2 *Do.* 18, 14, 394. 1 *Eac.* 84. 1 *Wils.* 174. 2 *Selwyn*, 335. 1 *Chitty*, 192. 1 *Coke*, 200, and 1 *Ld. Rayd.* 737.)

To interrupt this right, though but usufructuary, by turning the water from its channel through his land, is a direct privation of a right, it is a palpable wrong, of itself; and to erect a bank across the stream, so as to come in contact with the plaintiffs side, is a trespass; and I will add, that to do these acts after notice, and an offer on the part of the plaintiff to sell, savours of arbitrary power, neither allowable by law, nor to be countenanced among citizens, who have a right to claim the protection of person and property.

It is true, that the actual damages done to the plaintiff may be trifling, and the defendant has, very possibly, much of extenuation for his conduct. He may too, have erected a mill useful to the public; but having assuredly deprived his neighbour of a right, he must of course, answer for it in an action at law. Supposing it be even *damnum absque injuria*; yet in order to support an action, it is enough that the act proved, constitutes any "*damnum*," or violation of legal right. What has been the real injury to the plaintiff, is *for the jury to determine*, not the court. The nonsuit is therefore set aside, that the damage, whether great or small, may be adjudged by the jury.

Justices *Nott*, *Huger* and *Colecock*, concurred.

Mr. Justice *Gantt*:

Under the special circumstances of the case, I think the nonsuit was correctly ordered. There was no proof that the plaintiff had sustained an injury, and probable consequential damages is no ground of action.

Thompson, for the motion.

Clendinen & Farr, contra.

Jos H. WITHERSPOON, *et al.* vs. SAMUEL F. DUNLAP
AND MARY DUNLAP.

Petition for Partition.

"I will and bequeath to my son *Robert*, one of the plantations I now live on, adjoining *Wren and Roper*," was Held by the court to convey only a life estate.

Where there are no words of inheritance, or words equivalent thereto, the estate (of real property,) is for life.

Under the act of 1791, the circuit court has not the power to issue writs of partition, but in cases of *intestacy*; but where land has been devised for life only, without any ulterior disposition by the will, the court will grant a writ of partition of the remainder over, as in other cases of *intestacy*.

The above act (of 1791,) authorizes the appointment of surveyors, as in cases of dower, to run the lines between the lands to be divided, as other lands, as well as the lines between the divisions into which the land is to be partitioned; and to ascertain such division lines, reference may be had to the will devising the particular or life estate, in order the better, to admeasure the remainder, undivided; for wherever a power is given, every thing essential to its exercise, is impliedly conferred.

By the act of 1748, in all cases where any land shall be given or descend to any person in coparcenary, joint tenances or in common, such person or persons, as soon as they become of age, may apply to the circuit court for a writ of partition, and if any such persons, twelve months after becoming of age, neglect to do so, then the guardian of him or them not of age may apply.

And where there are no guardians, the circuit court under the act of 1808, has all the power appertaining to the court of equity, (besides the common law power of appointing *ad litem*) of appointing guardians, so far as the rights of minors are concerned, in the partition of estates either real or personal, under the act of 1791, as well as all other acts relative to the partition of estates, real or personal, (c)

THE petition in this case stated that on or about the — day of — in the year 1800, *Robert Crawford*, the elder, departed this life, having first duly made and executed his last will and testament, in which, after several bequests and devises, he gave to his two sons, *Robert* and *John*, the plantation on which he then lived, in the following words, viz. "I will and bequeath to my son *Robert* one half of the plantation I now live on, joining *Wren & Roper*. I

will and bequeath to my son *John*, one half of the plantation I now live on, including the improvements."

The petition further stated that the said *Robert Crawford*, the elder, left no widow at his death, but left the following children, viz. the parties to the petition, some of whom are minors. That *Robert Crawford*, jun. to whom the moiety of the said plantation was given, departed this life on or about the first of January, 1821, leaving neither widow or child, having first by deed, duly made and executed, conveyed all his right and title to the said plantation to *Sam. F. Dunlap*, who is now in possession thereof. That the said *Sam. F. Dunlap* is the son of *Mary Dunlap*, who was a daughter of *Robert Crawford*, sen. the testator. The petitioners then stated that they had in a friendly manner, applied to the said *Sam. F. Dunlap* and his mother *Mary Dunlap*, for a division of the said land among the heirs of the said *Robert Crawford*, sen. which request having been refused, they applied to the circuit court for a rule on the said *Sam. F. Dunlap*, and *Mary* his mother, to shew cause why a writ of partition should not issue, in conformity to the acts of the legislature in such case made and provided.

For cause, the said *Samuel and Mary*, by their counsel, shewed,

1st. That *Robert Crawford* took an absolute estate, under the will, in the moiety of the said plantation, and consequently the petitioners had no right to a partition thereof; and

2dly. That if *Robert Crawford*, jun. did not take more than a life estate under the will, yet as a division of *Robert's* moiety could not be effected without a prior division of the plantation into two equal parts, as required by the will of *Robert Crawford*, sen. this court had no jurisdiction, in as much as the act of 1791, does not authorise this court to issue partition, but in cases of intestacy, and the act of 1748, only authorizes a partition of land by this court, in cases of testacy, when the parties are of full age, or minors having guardians. That prior to the

act of 1791; this court had no power to appoint guardians for minors' persons or estates, and consequently this court cannot until such be appointed by the court of chancery, issue a writ of partition in this case.

The application for the rule was dismissed by the circuit court. A motion was now submitted to reverse that decision.

Mr. Justice *Huger* delivered the opinion of the court.

The application was dismissed in the circuit court on the second ground. No doubt was there entertained as to the first. But as in the argument, the counsel for the appellees has again urged it, an expression of the opinion of this court has become necessary.

In the case of *Hall & Goodwyn*, (2 Nott & McCord, 383,) it was decided that a devise of land without words of perpetuity, and where there is nothing in the will from which a fee can be raised by implication, vests only a life estate in the devisee. In that case, the preamble of the will contained the following words, "as touching such worldly estate as it has pleased God to bless me with in this life, I give, demise and dispose of the same in the following manner and form;" the devising clause was as follows: "I give and bequeath to *Robert Howell*, a tract of land of one hundred acres." The decision was, that *Robert* took but a life estate. In the case before the court, there is nothing in the preamble or in any other part of the will, from which the words in the devising clause can receive any colouring. The words are; "I will and bequeath to my son *Robert*, one half of the plantation I now live on, adjoining *Wren & Roper*." "One half of the plantation I now live, adjoining *Wren & Roper*," are words of description and convey no particular import. Where there are no words of inheritance, or words equivalent to words of inheritance, the estate is for life. Such has been the uniform decision of this court, and such is our unanimous opinion now.

On the first ground, therefore, the court is with the appellant.

The act of 1791, as has been contended, only gives to the circuit court the power to issue writs of partition in cases of intestacy. If, therefore, the application in this case, is to divide land in conformity to the will of *Crawford*, and the circuit court have no jurisdiction, but under that act, the petition was properly refused. But here two questions arise.

1st. Is this an application to divide land under the will of *Crawford*, sen. ? and,

2dl. If it be so, has not the circuit court jurisdiction under the act of 1748 ?

As the will makes no disposition of the land in question beyond the life of *Robert*, it is very clear that it must be divided under the act of distributions, which is the very case provided for by the act of 1791. In other words, it is a case of intestacy. It is true that in dividing this land in conformity to the act of distributions, it becomes necessary first to divide the original plantation into two equal parts, in order to ascertain the lines of the land to be partitioned. But wherever a power is expressly given, every thing essential to the exercise of that power is impliedly given. In this instance, however, little is left to implication. The act of 1791 declares that partition shall be made according to the act for the admeasurement of dower; which act provides for the appointment of surveyors to run the lines between the lands to be partitioned and other lands, as well as the lines between the divisions into which the land is to be partitioned. According to the act of 1791, then, the circuit court possessed jurisdiction, and a writ of partition ought to have been issued.

But had not the act of 1791 authorized the proceeding, the act of 1748 does. The words of that act are, "that in all cases where any lands shall be given or descend to any person in coparcenary, joint tenancy, or tenancy in common, when and as soon as any one of the said coparceners, joint tenants, or tenants in common, shall be of

the age of twenty-one, he may apply to the court of common pleas for a writ of partition; and if he shall neglect so to do for twelve months, then the guardians of him or them under age shall apply.

It is however said that although this act does authorize the courts to issue a writ of partition where there are guardians, yet where there are no guardians, it cannot do so, as it possesses no power to appoint guardians for persons or property. By the act 1808, (giving to the court of common pleas certain equity powers,) it is declared that all the power and authority appertaining to, and exercised by the court of equity as to the appointment of guardians of the persons and properties of minors, be and the same is vested in the Judges of the court of common pleas, so far as the rights of minors may be concerned in any real or personal property, to be divided under the act passed in 1791, as well as *all other acts* relative to the partition of estates real or personal. But independent of the act of 1808, the court of common pleas possesses at common law the power to appoint a guardian *ad litem*, and is in the daily habit of exercising that power.

In the case of *Crompton and Ulmer*, (2 Natt & M'Cord, 429.) some doubt was expressed as to the power of the court of common pleas, to appoint a guardian, but the question was not necessarily involved in the case, nor did the Judge who delivered the opinion of the court, mean to do more than express a doubt. I am of opinion therefore that the petitioners were entitled to a partition, and that the writ ought to have been issued.

The motion therefore must be granted.

Justices *Richardson* and *Gantt*, concurred.

Holmes, for the motion.

Miller, contra.

(a.) In the case of *Grant, et al. vs. Grant, et al.* at the circuit court held by Judge *Colcock*, it had been moved to confirm a return made by

the commissioners, in a case of intestacy, which his honor refused, because the guardians of the minors concerned, "had not entered into bond and security;" and the constitutional court on an appeal at this term, ordered the return to be confirmed; and Judge *Richardson*, who delivered the opinion, says, "It is to be observed that guardians *ad litem*, are the only agents required in order to defend minors in suits at law. Such guardians are all that were appointed in cases of partition, from the act for dividing estates of intestates, passed in 1791, down to 1808, when the act of that year, (1 *Brevard*, 231,) declares;—"and whereas, the rights of minors are often involved in such divisions, and no sufficient power vested in the said courts of common pleas, to protect the said rights of minors: Be it therefore enacted, that all the power and authority appertaining to, and exercised by the court of equity, as to the appointment of guardians of the persons and estates of minors, be, and the same is hereby vested in the judges of the courts of common pleas, or either of them, holding such court, so far as the rights of minors may be concerned in any real or personal property, to be divided under the said act of assembly, passed on the nineteenth day of February, in the year of our Lord, one thousand seven hundred and ninety-one, &c."

It is plain that the intent of the act was not to enable the court to divide intestates estates; for that power they had possessed ever since 1791; but to authorise the judges at law, to appoint guardians of the estate, *eo instanti*, that the estate was divided. The end was, that the minor might not himself receive his dividend after division made; but that it should go into the custody of a guardian. But this proceeding, intended to preserve the estate of the minor, is not to retard the progress of the suit, or postpone the division. The plaintiff being of full age, or married, claims the division as of right, in order to get his part, under the former act of 1791. If the minors should be unable to procure guardians, still his right cannot be disputed, and the court must still order the division, &c. to be made and confirmed, in order that the plaintiff may have his part of the estate. And as to the part going to a minor, the court may appoint guardians to receive and keep it, after the division is made.

In a word, the guardian of the estate has no necessary connection, with the inception, progress, or completion of the suit. He may be appointed at any stage of the case; but strictly and properly, his office commences on the termination of the suit. He is then, and not before, to receive and preserve the estate, which shall have been adjudged to, and which might, but for his appointment, go into the hands of the minor."

R.

KILE vs. GRAHAM.

Where two gave their joint and several note, upon which one was sued, the other cannot be a witness for the defendant.

DISMUKES vs. DISMUKES.

Wherever it is intended by a defendant to require security for costs, where the plaintiff resides out of the state, reasonable notice should be given to the plaintiff or his attorney, of such intention, prior to the court at which the cause is to be tried, that no plaintiff may be taken by surprise.

Security for cost does not depend upon the defendants putting in bail.

WILLIAM TURNER vs. JOHN McDANIEL.

An affidavit on filing a declaration in attachment, that the defendant was indebted to him, the plaintiff, on a note, &c. (stating it,) and that no part of the same was paid, and that he, the plaintiff, was indebted to the defendant, *some small amount, but he did not know how much*, contracted since the note was given, was *Held* by the court a sufficient affidavit, under the act.

Tried before Judge *Johnson*, Chester district, Spring Term, 1822.

Case on attachment. Motion to reverse decision.

THIS was a motion to set aside the proceedings on the ground, that the plaintiff's affidavit, filed with the declaration, admitted that the plaintiff was indebted to the defendant, but did not state by how much, nor was there an amount thereof sworn to and filed with the declaration, according to the form of the act of assembly in that case made and provided.

The presiding judge overruled the motion.

The defendant moved the constitutional court, to reverse the decision of the presiding judge, on the following grounds:

1st. Because the proceeding by attachment is an innovation on the common law, and is given to the citizen, only on the condition that he shall conform strictly to the provisions of the act of assembly; and his ignorance of his own rights, forms no excuse for non-compliance, as he only can have this action, who can comply with the provisions of the act giving that remedy.

2d. Because the decision of the court was contrary to law.

Mr. Justice *Richardson* delivered the opinion of the court.

The attachment act very properly requires the affidavit of the plaintiff in attachment, filed with his declaration, to be full and explicit, as to all credits to be allowed to the absent debtor; because the safety of the latter depends upon a full disclosure in the first instance, and upon the bond of the plaintiff in the second.

The words of the act are, "the plaintiff, on filing his, her, or their declaration as aforesaid, shall make oath to the debt or sum demanded, and that no part of the same is paid, and that he doth not in any wise, or upon any account whatsoever, stand indebted to the defendant; and in case the plaintiff shall be indebted to the defendant, then such sum shall be deducted out of the sum demanded; and in such a case a stated account shall be sworn to, and filed together with the said declaration." (*P. L.* 189.) The affidavit filed is as follows: "Personally appeared *William Turner*, the plaintiff, and upon oath being sworn, saith that the note on which this action is brought, of three hundred and thirty-six dollars ninety-one cents, is justly due to him, and that no part of the same is paid, and that he is indebted to the defendant some small amount, but he does not know how much, contracted since this note was given. Sworn to and subscribed, &c."

The objection supposes that an account current should have been filed. But such an account must have consisted, on the debit side, of one item only, and of none on the credit

side. The affidavit sets forth as plainly the whole truth, as any account, in a different form, could have done; there can then be no objection on the ground of a want of explicitness.

And to require the plaintiff to set forth in either form, which was the amount due to the defendant, when he does not know it, is to require an impossibility. The acknowledgment that something was due, may perhaps authorize the jury to deduct a certain sum from the note at a hazard; but it cannot invalidate the proceedings.

The motion is therefore dismissed.

Justices *Colcock*, *Nott* and *Huger*, concurred.

J. & R. S. Mills, for the motion.

Clendinen, contra.



ASA DINKINS & H. MACON vs. WM. VAUGHAN & JOHN
McLAUCHLIN.

The act of 1809, which refers the "sum actually due," on any liquidated demand to be assessed by the clerk, does not include cases wherein the judgments were final, and required no verdicts even before the act; as for instance, debt on bond or judgment.

Sumter. Motion to set aside judgment and execution.

THIS was a case of debt, on a judgment which was referred to the clerk at the extra court in May, 1819, who assessed the damages on the 24th May, 1819, at \$78 39, and stated the debt at \$378 17.

Judgment was signed on 21st June, 1820, and execution issued.

The motion in the circuit court was to set aside the judgment and execution, because the judgment was not entered until more than a year and day had elapsed since the assessment; which motion was overruled. From this decision the defendant appealed, and renewed the motion to set aside the judgment and execution, because the judg-

ment was not entered up, until a year and day after the assessment.

And because this was not a case which ought to have been referred to the clerk.

Mr. Justice *Richardson* delivered the opinion of the court.

The act of 1809, which refers the "sum actually due," on any liquidated demand to be assessed by the clerk, could not have intended to include such cases wherein the judgments were final, and required no verdicts even before the act. As for instance, debt on bond or judgment. In such cases, the remedy was perfect before the act, and required no alteration.

It is to be observed too, that although judgments usually bear interest, yet I am not prepared to say, that circumstances may not attend a judgment, which would authorize a jury to assess no interest; and assuredly the clerk can assess no interest in any case in which interest does not follow as a matter of course; his office being in this respect merely ministerial, i. e. to compute the amount actually due, and not to exercise any discretionary power.

The motion is therefore granted.

Justices *Cockock* and *Nott*, concurred.

De Saussure, for the motion.

Miller, contra.

CASPAR R. EDSON vs. SAM. DAVIS.

Minors (by the act of 1788,) have *five* years after their coming of age, to prosecute their claims if to land, and *four* years if to personal property; and it is the same, whether at the time of their coming of age, they were within or without the state.

If the plaintiff commence his action for the recovery of land, within the five years, and such action be nonsuited, discontinued or in any other way be let fall, he or any one claiming under him, may, yet nevertheless, within two years of such nonsuit, &c. commence his second

action for the recovery of such lands, and it will not be barred by the statute.

Trespass to try Title.

THIS was an action of trespass to try titles to two lots of land in the village of Union.

The plaintiff's paper title was not disputed, but the defendant relied on the plea of the statute of limitations. To which the plaintiff replied specially his minority and residence out of the state at the time of his coming of age, and a former suit brought within two years of the letting fall of which the present action was commenced.

The jury found a verdict for the defendant.

A motion was now submitted for a new trial, on the following grounds:

1st. Because the court misdirected the jury, in stating that the plaintiff was not entitled to more than five years, after he came of age for bringing his action, although he resided at the time out of the state.

2dly. Because the court misdirected the jury in stating that the first action could not arrest the statute of limitations.

Mr. Justice *Huger* delivered the opinion of the court.

By the act of 1788, the legislature has destroyed the distinction between minors coming of age, within or without the state. They are all put upon the same footing. They have five years after coming of age, to prosecute their claims to land, and four years to prosecute any personal action to which they may be entitled. On the first ground therefore the plaintiff must fail.

The act of 1712, usually called the limitation act, provides in the 19th sec. "that should verdict and judgment pass against the plaintiff in such action, or should he suffer a nonsuit, or discontinue, or any other way let fall the same, such verdict or judgment, nonsuit, or discontinuance, or the letting fall the action or suit aforesaid, shall not be conclusive or definitive on the part of such plaintiff."

but at any time within two years, the plaintiff or any person or persons, claiming by, from, or under him, shall have right, and is hereby empowered to commence his action for the recovery of said lands."

The second action is connected with the first by the act, provided, it is commenced within two years. As the present action was commenced within that time, the first must be regarded as having arrested the statute; and this I think has been the construction uniformly given to this act. On the second ground, therefore, the motion must succeed.

Justices *Colcock, Nott and Richardson*, concurred.

Mr. Justice *Gantt* :

I concur on the first ground, but not on the second.

W. Thompson, for the motion.

Herndon, contra.

EXECUTORS OF WILLIAM THOMAS, ENDORSEE, JEREMIAH BROWN, JR. vs. JEREMIAH BROWN, SEN. AND JAMES D. BROWN.

A judge who has presided at the trial of a case, on the circuit, cannot set aside a verdict of a jury, rendered after a full hearing, without any allegation of surprise or mistake, or any objection made to the time or manner of the trial; but simply because the verdict is alleged to be intrinsically against law or evidence: It must be by appeal to the constitutional court.

It *seems* cases have occurred wherein verdicts taken by surprise or inadvertency, have been set aside by the presiding judge; but none, where the objections were to the merits of the verdict, and not to the manner or time of trial. (*a.*)

The borrower of money lent upon usury, may in a civil suit be a competent witness to prove the usury against the lender, who sues upon the usurious contract, where the lender will not deny the usury on oath, or is dead and unable so to deny it.

Tried before Judge *Nott*, Marion district, Fall Term, 1821. Motion to rescind the order of the presiding judge.

THIS was an action of *assumpsit*, brought by the executors of William Thomas, against the defendants on a promissory note for \$ 1600. The defence set up was, that the note was unsound ; and the endorser and one of the principals, *James D. Brown*, were called to prove the fact of usury.

The jury found a verdict for the plaintiff, for \$ 1280, (which amount the endorser said he received for the note,) with interest from the date of the note.

On motion of defendants counsel, the presiding judge set aside the verdict of the jury, "because it was unsupported by law and evidence."

The plaintiff's now moved to reverse the order of the presiding judge, on the following grounds, to wit :

1st. That there does not exist in the judiciary of this state, any power *merely* to set aside the verdict of a jury, and nothing more.

2nd. That if such a power does exist, it cannot be exercised by the judge who presided at the trial of the cause.

3rd. That the finding of the jury was *pertinent* to the issue, and therefore the presiding judge could not set it aside.

4th. There was no legal evidence of *usury* ; because the testimony of the endorser could not be received to invalidate the note. 1st. because he was *interested* ; the note having been negotiated for his accommodation ; and 2nd. because having given currency to the note, he could not be received to destroy it.

5th. That by the true construction of the usury act, neither plaintiff nor defendant can be a witness in the *civil suit*, brought by the lender against the borrower, and that the borrower, by that act, is only allowed to be a witness in the *penal action* given to an informer, against the *usurious lender*.

6th. That even if the borrower can be a witness in his own case, he can only be so during the *life time* of the *lender*; as the act requires that the oath should first be tendered to the *lender*, and it is only in case of his refusal to swear and purge himself, that the *borrower* is allowed to swear.

Mr. Justice *Richardson*, delivered the opinion of the court.

The material question made in this case is, Can a Judge who has presided at the trial of a case, set aside the verdict of a jury, rendered after a full hearing, without any allegation of surprize or mistake, or any objection made to the time or manner of the trial; but simply because the verdict is alleged to be intrinsically against law or evidence?

Cases have certainly occurred wherein verdicts taken by surprize, or inadvertence, have been set aside by the presiding Judge; but I know of no instance, where, as in the one before us, the objection was to the merits of the verdict, and not to the manner or time of the trial. It appears, both, from the constitution and legislative enactments too, that the right to grant new trials, is confined to this court alone. The 3d section of the 10th article of the constitution, declares, that "at the conclusion of the circuits, the Judges shall meet and sit at, &c. for the purpose of hearing and determining all motions which may be made for new trials, &c. In this article of the constitution, we find the right of granting new trials expressly confined to the Judges assembled at a court of conference. This right appears too, to be no more than a recognition of the former practice of the Judges, to meet on the adjournment day for the same purpose. This was the old practice. But admitting this article of the constitution to be of doubtful construction, yet the act of 1799, (2 *Faust*, 316,) supplementary to the act establishing the system of judicature, is explicit. After directing the Judges to meet in order to hear and determine motions for new

trials, it proceeds thus, &c. "Nor shall any Judge who shall have presided at the trial of any cause, &c. ever sit or vote at such meeting of the said Judges on the same cause or any matter or thing whatsoever, which shall arise out of, or shall concern the said cause." I can scarcely conceive a prohibition broader, or more comprehensive. And though it may be deemed an over-cautious and even a jealous provision, yet for myself, I consider it wise and salutary, taking man as he is practically seen and known. Now, how entirely at variance with the true spirit of this salutary prohibitory rule, would it be, if the very judge, who at the conference of all the judges, and under their control, is forbidden to vote, should yet have power, when *alone*, to grant a new trial, by setting aside a verdict taken at a court where he presides. The whole spirit of the prohibition seems to rise up against the conclusion, that the presiding judge may, of his own sole authority, order a new trial in the one case, when in the other, he cannot even have a voice.

The motion is therefore granted upon the *second ground* taken in the brief; so that we need not consider separately, every ground set forth. There is however one, which, unless expressly determined, might be hereafter relied upon, and the court will therefore consider it now—That the *borrower* of money lent upon usury, may, in a civil suit, be a competent witness to prove the usury against the *lender*, who sues upon their usurious contract, has been so long permitted, and is so plainly sanctioned by the act of 1777, (*P. L. 387*.) in cases in which the *lender* will not deny the usury upon oath, that little need be said upon it. As a general rule, (*2 Bay 177*.) it is too well established, to be now shaken.

But the sixth ground taken in the brief, supposes that this note should be confined to cases wherein the lender is alive at the time of trial, and refuses to be sworn.

The proviso in the act of 1777, which gives rise to this distinction, is in these words: "provided, that if the person, &c. against whom such evidence is offered, will deny

upon oath, &c. the truth of what such evidence, (the borrower) offers to swear against him, then such witness, (the borrower) shall not be sworn."

Here it is supposed, that as the lender may, by denying the usury, upon his oath, prevent the borrower from being sworn, he being dead, and unable to deny the charge, the borrower shall not be allowed to prove the usury by his own oath, against representatives who cannot have the alternative given by the act to the lender himself, if alive. And certain it is, that injustice may be done by a hardened and unprincipled debtor in such a case. But on the other hand, when the borrower is dead, his representatives must in turn lose too often the only evidence of the usury practised upon him in secret, and the usurer then obtains his judgment, without denying the usury upon oath. The rule laid down by the act, may have its evil consequences; but it is a general rule, with but one specific exception.

The words of the act, are "that in *all cases* whatsoever, &c. the borrower, &c. shall be, and is hereby declared, to be a good and sufficient witness in law, &c."

And then comes the single exception, i. e. where the lender will deny the usury upon his oath. To multiply these exceptions by construction, would be to fritter away the rule itself. And though the court is sensible, that occasionally, injustice may follow from it; yet confiding that, in all cases where the party charged with the usury is dead, that nothing less than a very convincing development of the usurious transaction on the part of the lender, will be received as full proof of the charge, we must take the rule as enacted by the legislature, together with the specific exception alone.

In this case, though the court are of opinion that the order made, must be reversed; yet as by the mistake made, the defendants have had no opportunity of making a shod-

tion for a new trial before this court, and as there would be evident merits in such a motion, a new trial is ordered. Justices Colcock, Huger, and Gantt, concurred.

May & Sanford, for the motion.

Mayrant, Evans & Taylor, contra.

(a.) In the case of *Banks vs. Manning*, Judge Richardson, who then delivered the opinion of the court, said, "the court has just now decided in the case of the ex'ra. of *Thomas vs. Brown*, that as a general rule, the circuit court cannot, after a full hearing, set aside a verdict rendered upon the merits, such cases being confined to this court; still I cannot doubt that cases may occur, of the character of the one before us, wherein both the party litigant, and the court too may be deceived, and led into a trial that ought not to have taken place, at the time, or in the manner practised, and in which the circuit court may set aside the verdict on the ground of fraud, surprise, or mistake. In such a case, the objection would not be to the merits of the verdict, but there should have been no trial at that time. It would be not unlike setting aside a verdict for irregularity; as for instance, want of a proper affidavit, or bond in attachment. Such a power may be absolutely necessary to justice; and the case not being clearly provided for, and given *ad alios examen*, as in the case adjudged, may come within the general powers of the court, or be incidental thereto. But to come within such an exception, the case should be very clear."

FREDERICK R. STOKES vs. STEPHEN STUCKEY.

Where the defendant said of the plaintiff, "you did steal my brothers cotton and I can prove it," the Court *Held* it actionable; nor does it seem it would have made any difference, if the defendant had alluded to cotton, which the plaintiff had to gin for defendants brother.

Tried before Mr. Justice Gantt, Sumter district, Spring Term, 1822. Slander.

THE words charged and proved, were "you did steal my brothers cotton and I can prove it." The words appeared to have been spoken in relation to some cotton,

which had been sent to plaintiff's gin, by a brother of the defendant.

A motion was made for nonsuit, on the ground that the words were not actionable, and the motion overruled on the ground that the jury were to judge of the meaning of the expression.

Verdict for the plaintiff.

New trial moved for, as the charge was merely of a breach of trust.

Mr. Justice *Gantt* delivered the opinion of the court.

The motion for a nonsuit was properly overruled. The evidence is by no means certain, to shew that the expression did specifically allude to the circumstance of the cotton carried to the plaintiff's gin; it was rather an inference of the counsel, than the conclusion of the witness, or judge presiding.

The witness only supposed, and perhaps correctly, that such was the allusion of the defendant, in making use of the expression he did. But although that were the fact, it would not alter the law of the case.

The plaintiff might steal cotton entrusted with him to gin. He might be guilty of such a breach of trust, as would amount to a felony; and this he was charged with having done in the present case.

There is no ground of appeal in this case, and the motion is refused.

Justices *Nott*, *Golcock*, *Richardson* and *Huger*, concurred.

Miller, for the motion.

De Saussure & Holmes, contra.

STATE vs. SPERGEN.

Where the defendant was indicted for horse stealing, and at the first court there was a *mistrial*, in consequence of the jury finding him

guilty of petit larceny: (a.) and at the second court, was not tried in consequence of the state not being ready, the Court *Held* that though he demanded his trial, yet he was not entitled to be discharged according to the provisions of the *habeas corpus* act.

Tried before Judge *Colcock*, Spartanburgh.

THE defendant was indicted in Fall Term, 1821, for horse stealing, and having demanded his trial, was accordingly tried; when the jury found a verdict of "guilty of petit larceny." This verdict was set aside as irregular and void by the constitutional court; but the defendant remained at Columbia; and his counsel at the last Spring Term, 1822, moved for his discharge under the *habeas corpus* act, which was ordered: and this appeal was on the part of the solicitor, to reverse the decision, upon the ground that by the true construction of the *habeas corpus* act, the defendant was not entitled to his discharge at that court,

Mr. Justice *Richardson* delivered the opinion of the court.

The question arises under the 7th clause of the *habeas corpus* act, which is in these words, "It shall and may be lawful, to and for the judges, &c. and they are hereby required, upon motion to them made, in open court, the last day of the term, &c. to set at liberty the prisoner upon bail; unless it appear to the judges, &c. that the witness for the king could not be produced the same term, &c. and if any person or persons committed as aforesaid, upon his prayer or petition in open court, the first week of the term, or first day of the sessions, &c. to be brought to his trial, shall not be indicted and tried the second term, &c. after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment."

The unquestionable intent of the act, is to require the state to bring the prosecution to trial on the first or second term, or else that the prisoner shall be discharged. In other words, the state must not be in default for two

terms. Now at the first term, the prisoner demanded his trial, and the prosecution was tried. The state then committed no default; the mistrial being a misfortune, attributable neither to the state nor to the defendant. The court and jury were equally for both parties, and both were ready at that court and the trial had. At the second term, the state was not ready. Here then was the first default, and the prisoner under the terms of the act, might demand to be bailed, and if the state should not be ready at another term, then to be discharged. The error arises from supposing that the mistrial is to be attributed to the state, but the jury are as independent of the state as of the defendant.

It may happen that at the second term, and in the middle of a trial, the judge or a juror might be taken sick. But could such a misfortune be attributed to the state? Surely not. The consequences would be dangerous indeed. And yet a mistrial would follow; and according to the decision, the prisoner would be discharged. The act could never have been intended to require impossibilities, but merely to lay down a rule for expediting the trial of state prosecutions. The important words are "if any person, &c. shall not be indicted and tried, &c. *or upon his trial shall be acquitted*, he shall be discharged." Here we see that "if indicted and tried," he must be acquitted before he shall be discharged; and why? Plainly because, to indict and try, is within the power of the state, but nothing further, the issue of the trial being in other hands. And accordingly, after being indicted and tried, the prisoner must be acquitted before he shall be discharged. The words "or upon his trial shall be acquitted," would be wholly unmeaning and superfluous if this were not the true construction. The literal import of the words agrees then with the obvious end and intent of the act.

The motion is therefore granted.

Justices *Huger* and *Johnson*, concurred.

Mr. Justice *Colcock* :

I dissent. The uniform construction of the statute has been, that on the second court, the accused must be discharged if he comply with the requisites of the act in demanding his trial the first day of the court, &c.

Davis, solicitor, for the motion.

Thompson, contra.

(a.) See this case reported, *ante* 252. R.



ANDREW LARK vs. JOHN CHAPPELL.

Where the defendant was served with a writ, by a copy being left at his house, as is required by the act, and on a motion to set it aside, upon affidavit that "he was without the limits of the state at the time, to wit, in Georgia," without saying that he was surprised or was in danger of suffering injury by his not knowing of such service, the court refused to set it aside; as the party may reside on the borders of the state, and may have only gone into his fields, or any small distance out of the state, in order to avoid the service of legal process.

Tried at Laurens, Spring Term, 1822.

THE defendant in this case, had been sued by leaving a copy of the writ at his usual place of residence. At the return of the writ, he moved to set aside the service, on the ground that he was out of the state at the time. In support of his motion, he produced an affidavit of which the following is a copy :

The defendant makes oath that at the time the copy writ in the above case was left at his house, he was without the limits of this state, (to wit,) in the state of Georgia.

The presiding judge being of opinion that the service was not good, ordered it to be set aside.

This was a motion to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the court.

The act upon the construction of which the present motion depends, is in the following words : " In case the defendant shall abscond or absent himself, so that he cannot

be found, the marshal or his deputy shall serve the defendant therewith, by leaving a true copy of such writ, at the dwelling house or the most usual and notorious place of residence or habitation of the defendant, &c. provided that nothing in this act contained, &c. shall extend to any person or persons *gone off from this settlement, and not being actually resident in the same, at the time when the copy of such writ, shall be left at the house of such person as aforesaid.*"

The principal object of the act appears to have been to obviate a difficulty which it is apparent must frequently happen in the service of writs, when the defendant is accidentally or designedly from home. Nevertheless it would be contrary to the spirit of it, to give it such construction as to subject a person to a judgment, who had not the means of knowing that a suit had been instituted against him. Perhaps it will be difficult to give it any construction that will not be attended with some inconvenience. We must, therefore, look for that which (attended with the least mischief,) will give it the most practical operation. It will be observed, that the states of No. Carolina and Georgia, bound our state in its whole extent on two sides. The citizens of each, are separated only by an imaginary line. A man's house may be in one state, and his plantation or his garden in another. The dividing line of the states may even divide his house, leaving one part in one state, and the other in another. Now it cannot comport with the spirit of the act, to say the service of a writ shall be void, merely because the party was walking in his garden or had rode to his plantation in another state, not a mile from his house at the time the copy was left. On the other hand, a party might be surprised by the service of a writ in such manner, when absent in a foreign state or country. But it would always be in the power of the court, to protect or relieve a person from any mischief which might be about to result from such a service, under these circumstances. In the present case, the defendant barely says he was in the state of Georgia, when

the writ was served. He does not deny having received the copy writ, or say that he has been surprised, or is in danger of suffering any injury by it. If such an objection was to be allowed, the service of half the writs on the two frontiers of the state probably would be set aside, and the object of the act in a great measure defeated. I think that the service of the writ was good, notwithstanding the defendant happened to be over the line of the state, at the time the copy was left at his house. The motion must therefore be granted.

Justices *Gantt* and *Huger*, concurred.

Mr. Justice *Richardson*, dissented.

Simpson & Dunlap, for the motion.

O'Neill & Irby, contra.

TREASURERS OF THE STATE vs. M. C. WIGGINS.

Defects in a replication must be taken advantage of by special demurrer.

Where the plaintiffs were stated to be the successors of the treasurers to whom the bond in suit was given, if the defendant objects to their being the successors, he must plead it in abatement.

To an action upon the sheriff's bond, *non est factum* and performance were pleaded. Issue on the first, and replication that the defendant had collected a certain sum and had not paid it over, pursuant to the order of court; to which the defendant demurred generally. The court overruled the demurrer; the jury found for the plaintiff, on the issue of fact; the Court ordered the condition of the bond to be submitted to the jury, to assess the damages.

THIS was an action of debt on a sheriff's bond, to which the pleas of *non est factum* and performance were pleaded. Issue was taken in the former, and a replication put in to the latter, setting forth a breach in not paying over certain monies arising from the sale of an estate in a case of partition, pursuant to the order of court. To the replication the defendant demurred, and the plaintiffs joined therein.

The demurrer was overruled by the court, and the jury found for the plaintiff, on the issue of fact. The defendant then insisted on his right to have the condition of the bond submitted to the jury to assess the damages; but in as much as in the replication the sum which had been received by the sheriff under the sale which had been ordered, was particularly set forth, and that fact being admitted by the demurrer, it superceded, in the opinion of the court, the necessity of a reference to the jury; there being no necessity to prove what the pleadings admit.

The defendant also claimed the right of entering up a judgment of nonsuit, on the ground, that the plaintiffs had failed to prove that *Levy* and *Elmore*, in whose names this action was brought, were the successors in office at the time of bringing the action of the Treasurers to whom the bond was originally given. In the argument on the demurrer, various objections were also urged as to the insufficiency of the replication, and noticed in the brief under the following grounds:

1st. Because the replication did not set out who were the persons injured by the sheriff.

2d. Because the replication did not show that the money collected by M. C. Wiggins was collected in his official capacity.

3d. Because it was not alleged that the court had ordered a sale in a case of intestacy.

4th. Because it was not averred that *David Archer*, to whom the sheriff was directed, by the order of court, to pay a part of the sum collected, as guardian, had given the security required by the order of court.

5th. Because the persons claiming as plaintiffs in this action, had separate and distinct interests.

The case was tried before Judge *Gantt*, Spring Term, 1822, at Camden, who overruled all the foregoing objections. The present was therefore a motion for a nonsuit, or a new trial, on the grounds above noticed.

Mr. Justice *Gantt* delivered the opinion of the court.

A demurrer in pleading is an admission by the adverse party of the fact charged in the count or declaration, plea, replication, &c. but refers the law arising on such fact, to the judgment of the court; and on a general demurrer, which this was, judgment is to be given, as the right shall appear, without regard to any imperfection as to the form of pleading.

It would be unnecessary to go into the distinction between matter of form and substance, formally so strictly regarded in the English courts, and I will only observe, that by several of the statutes of Jeofails, the distinction has been in a great measure done away. If the plaintiffs were not the successors of the treasurers, to whom the land was given, and advantage was intended to be taken of that circumstance, it ought to have been pleaded in abatement; and as regards the supposed defects in the replication, the defendant to take advantage thereof, ought to have demurred specially. Ostensibly, the plaintiffs appeared to be fairly entitled to receive certain monies which had been collected by the sheriff under an order of court, founded on proceedings had therein, wherein a sale had been ordered. It was alleged that the sale had been made, that the sheriff had received the money, and had failed to pay it over as directed by the order of court. These facts were admitted by the demurrer, and the defendant cannot screen himself under this demurrer, by objections which have nothing to do with the merits of the case. The court are therefore of opinion, that the demurrer was properly overruled, as also the motion for a nonsuit; but they think that the condition of the bond should have been submitted to the jury, in order to the assessment of the damages which had accrued to the plaintiff by the breach assigned;

which procedure is ordered before the plaintiffs can take out execution.

Justices *Colcock*, *Nott*, *Richardson* and *Huger*, concurred.

Holmes, for the motion.

S. D. Miller, contra.

ANDRE MATTHIEU vs. WILLIAM NIXON.

Where the plaintiff's declaration contains three counts, (1) as *endorsee*, (2) for goods sold and delivered, and (3) *quantum valebant*, he is not confined in his evidence to any particular one.

Assumpsit.

THIS was a motion to set aside a nonsuit ordered by Mr. Justice *Gantt*,

Because the presiding judge was wrong in confining the plaintiff in this case, in his proof, to the first count in his declaration against the defendant as endorser, saying that as the plaintiff had sued as endorsee, he therefore could not give evidence in support of the second count, which was for goods, &c. sold and delivered, or on the third, which was for their value in the usual form of a *quantum valebant*.

Mr. Justice *Gantt* delivered the opinion of the court.

A new trial is ordered in this case, on the ground taken in the brief; the court being of opinion that it was competent for the plaintiff to offer the evidence which was overruled by the court.

Justices *Colcock*, *Richardson* and *Huger*, concurred.

J. Carter, for the motion.

J. C. Carter, contra.

SAUNDERS GLOVER & Co. vs. ADMR. OF A. OTT.

What are necessaries for an infant is a question of law for the court.

How much and of what quality, must depend upon the infants pecuniary circumstances, and of these, the jury are to judge. (a.)

Lodging, clothing, food, medicine and education are necessaries to every infant; such articles, therefore, as come under such heads, must be allowed; but liquor, pistols, powder, saddles, bridles, whips, fiddles, fiddle-strings, &c. are not to be allowed.

THIS was an action on an open account. The defendant relied on the plea of infancy. The replication stated that the account was for necessaries furnished. On this, issue was joined. The whole account amounted to \$606 95, of which \$329 50, had been paid. The items in the account were various. Some for clothing, medicine, books, and others for saddles, bridles, whips, liquor of different kinds, fiddles and fiddle-strings, powder and pistols.

The verdict rendered, was for \$267 45.

A motion was now submitted for a new trial, on the ground that the verdict includes articles that are not necessaries.

Mr. Justice *Huger* delivered the opinion of the court.

What are necessaries for an infant, is a question of law for the decision of the court. How much, and of what quality the necessaries should be, must depend upon his pecuniary circumstances, and of these, the jury are the judges.

Lodging, clothing, food, medicine and education, are necessaries to every infant. Such articles, therefore, as come under these heads, must be allowed. The others, such as liquor, pistols, powder, saddles, bridles, whips, fiddles, fiddle-strings, &c. amounting to \$111 53 1-2, ought not to have been allowed. A new trial must therefore be granted, unless the plaintiff shall remit so much of the verdict.

Justices *Nott*, *Richardson* and *Colcock*, concurred.

Mr. Justice *Gantt* :

I concur in the opinion, so far as it relates to the specified deductions, but I think it should go back for the jury to say whether all the remaining articles were necessary or not, particularly as respects the quantity of cloth charged.

Felder, for the motion.

Glover, contra.

(a.) See *Rainwater vs. Durham*, 2 *Nott & Mc Cord*, 524. "An infant, (says Judge *Brevard*, in the case of *Boucheli vs. Clary*, at Columbia, 1815,) may bind himself, or contract for necessary meat, drink, apparel, physic, schooling, and the like; suitable to the circumstances and situation of the infant in life, and the society in which he moves. The articles in such case, ought to appear to be necessary for him, and plainly and clearly so, and to be furnished at reasonable prices." R.

CADEY GEUING ADS. THE STATE.

A husband, whose wife in his presence retails spirituous liquors, without a license, is liable for the same.

On an indictment for retailing spirituous liquors, without a license, the State need not prove that the defendant had not a license, as the defendant must prove he had one.

Tried before Mr. Justice *Gantt*, Chester district, Spring Term, 1822.

THE defendant was convicted on a charge for retailing spirituous liquors, without license, contrary to the act of assembly. He appealed for a new trial on several grounds :

1st. That it ought to have been proved that the defendant, either sold the liquor in person, or authorized the sale of it; and

2dly. That it ought also to have been proved, that the defendant had not a license to retail.

Mr. Justice *Gantt* delivered the opinion of the court.

From the report of the evidence which the trial furnished, it appears that the defendant was present when his wife sold liquor and received the money for it; and it was distinctly left to the jury to determine from the circumstances attending the transaction, whether the sale thus made, was with the privity and assent of the husband. Without this, they were told the husband was not answerable for the improper conduct of his wife. The verdict of the jury, therefore, on this ground, is conclusive of the fact, that the act of the wife in this instance, must be considered as the act of the husband himself.

On the 2nd. ground, the testimony furnished was abundant to shew that the defendant did sell without a license. *John Blakely*, a witness sworn on the trial, proved that the defendant, on being advised by him to get a license, after having been in the practice of retailing for five or six years, declared that he would not.

But independent of this evidence, which is of itself sufficient to shew that the defendant sold without a license; it is the opinion of the court, that the burthen of the proof lay on the defendant, and that it was incumbent on him to shew that he had been licensed to retail; a fact, which if it existed, could easily have been made to appear by the production of his license.

The motion for a new trial is refused.

Justices *Colcock* and *Huger*, concurred.

Mr Justice *Richardson* :

I dissent from the opinion that the burthen of proof to shew the defendant had a license lies upon him. The State ought to prove he had *no license*, which may be done by the commissioners or clerk of the board.

May, for the motion.

Evans, contra.

HOWELL ADKINSON vs. ELISHA BARFIELD.

Where the plaintiff attached a horse, the property of his absent debtor, in the possession of the defendant, who promised that if the plaintiff would release the horse, he would pay the debt, the Court *Held* the promise good; as neither being within the statute of frauds, nor a *nudum pactum*. (a.)

This was a summary process, tried before Mr. Justice Gantt, Spring Term, 1822, for Chesterfield district.

THE following facts appeared in evidence on the trial of the case. The plaintiff had taken out an attachment against *Jahn Braddock*, which was levied on a horse. The defendant promised that if the plaintiff would release the horse, he would pay the debt for which the attachment had been issued. This was accordingly done. On the trial of this case, it was insisted that the promise was within the statute of frauds and perjuries, and therefore void; being to pay the debt of another, and not in writing. It was also contended, that the agreement was *nudum pactum* and the plaintiff not entitled to recover on it.

Both these objections were overruled, and a decree was given in favour of the plaintiff.

The defendant appealed, and moved that the decree be set aside, and that a nonsuit be entered up for the reasons urged on the trial below.

Mr. Justice Gantt delivered the opinion of the court.

On the last ground taken in the brief, founded on the rule of the civil law, that "*ex nudo pacto non oritur actio*," I have to observe that the consideration on which the present action is founded, takes the case entirely out of the rule. In every case, where the consideration is one of benefit to the defendant, or of benefit to a stranger, or of damage or of loss sustained by the plaintiff, at the request of the defendant, *assumpsit* may be maintained. Indeed the authorities go so far as to say, that an inconvenience sustained by the plaintiff, however small, may be a sufficient consideration if suffered by the plaintiff, with the

consent, either express or implied of the defendant ; or in the language of pleading " at the special instance and request of the defendant." (See 1 T. R. 21. 8 T. R. 610.) In this case, therefore, the plaintiff on the promise of the defendant to pay the debt, if he would release his right to the horse under the attachment, gave up a lien which the attachment had created, and in doing so, he most probably relinquished at the same time, all other expectation of securing his debt, but what arose from the promise of defendant. This ground, therefore, cannot be maintained.

Nor is the 2nd. ground a more tenable one. Where a promise is made to a landlord who goes to distrain for rent, that if he would desist from making the distress, the promiser would pay the rent in arrear, such a promise has been held not to be within the statute. (2 Wils. 308.)

The analogy between the case put, which is recognized as law by lord Eldon, in the case of *Houlditch vs. Milne*, (3 Esp. N. P. C. 86,) and the one under consideration, is certainly very strong. The attachment gave to the plaintiff priority of claim, *quoad* the property attached. He had a lien upon the horse, in virtue of his attachment, and this having been relinquished on the promise of the defendant to pay the debt, the statute of frauds cannot apply to the case.

The motion, therefore, to reverse the decision made on the circuit, is for the reasons given, refused.

Justices *Nott*, *Richardson* and *Colcock*, concurred.

Evans, for the motion.

McIver, contra.

(a.) See ante 486, the case of *M'Cray vs. Madden*.

JOHN ZEIGLER vs. WM. G. HUNT, *et ux.* ADMR'S OF D.
BARSH.

To a claim for work and labor, the statute of limitations does not commence to run from the time the contract was made, but from the time the work was finished. A promise to pay, always continues up to the time the work is done.

Orangeburgh, Spring Term, 1822.

Mr. Justice *Nott* delivered the opinion of the court.

THIS was an action brought for carpenters work. The performance of the work and the value of it were sufficiently proved. And although there was some little conflicting evidence, the preponderance was clearly, I think, in favour of the plaintiff.

The defendants relied on the statute of limitations. But in order to have the benefit of it, it was necessary to date its commencement at the time of the contract, and not at the time the work was finished. But that was an incorrect view of the subject. A promise to pay, always continues up to the time the work is done; otherwise, as has been well observed by one of my brethren, if one man continue in the employment of another four years, the demand for his services would be barred by the time he had been employed.

Another ground of defence relied on, was that the plaintiff quit his work before it was finished, and therefore, he had forfeited his claim for compensation. But it was not his fault. He quit his work for the want of materials, which it was the duty of defendant's intestate to have found, and with his consent. He was entitled to pay for the work which he had done. The jury have given him a verdict, and the court is quite satisfied with it. The motion is refused.

Justices *Gantt*, *Richardson*, *Colcock* and *Huger*, concurred.

Chappell, for the motion.

Glover, contra.

A wife cannot commit a trespass (so as to be made liable to an action) in the presence of, and in connexion with her husband. In such case, she is supposed to act under his authority, and he alone must be sued.

Where the trespass is committed by the wife alone, the husband must be joined in the action; but the declaration must state that it was so committed by the wife.

An action on the case, for jointly enticing and harbouring a slave, will not lie against husband and wife; the declaration should state the enticing and harbouring to have been done by the wife solely.

THIS was an action on the case against a husband and wife, for enticing away and harbouring a negro in the possession of the plaintiff.

The declaration alleged the enticing, harbouring, &c. to be committed by husband and wife.

It was proved that the plaintiff had hired the negro in question, at \$170 per annum.

The only evidence legally before the court, was a confession of the husband to this effect, "that his wife and children did harbour the negro, but that it was against his will," and there were no other words or circumstances proved by the witness who testified to this admission.

The jury found a verdict for one hundred and seventy dollars.

The defendant now moved for a new trial, because the damages were excessive: And in arrest of judgment,

Because an action would not lie against husband and wife, for jointly enticing and harbouring a slave; but the declaration should have stated the enticing and harbouring to have been committed by the wife solely.

Mr. Justice Colcock delivered the opinion of the court.

In this case, the motion in arrest of judgment must prevail. Trespass cannot be laid to have been committed jointly by husband and wife. If in fact, it be so committed, the

husband alone must be tried; for the wife is not implicated when acting in the presence of, or by the command of her husband.

The only authority to be found against this doctrine is that to which the court has been referred in this case, viz. 1 *Chitty*, 18; who certainly does say, that "for assaults and other wrongs, in which two persons may concur, the husband and wife may be sued jointly for the act of both, and the acquittal of the husband will not preclude the plaintiff from recovering. But on an examination of the authorities referred to, it will be found that they do not support the position. The case from *Ventris*, states that it was an action against husband and wife, but does not state that it was charged to have been committed by both. On the contrary, it furnishes what is to my mind conclusive evidence, that it was not so, i. e. first, that the husband was acquitted, and secondly, it is said that in the case, that the husband ought to have been joined only for conformity, which seems to shew that the act was committed by her alone. The other *Herny vs. Guie*, from *Telverton*, 106, which is a case of trespass by the wife, and all the cases, as far as I could procure the books, seem as wide of the position. The case in 2 *Bacon*, 503, from 2 *Lev.* 63, when explained by the note, shews clearly that the act was done by the wife.

I feel therefore bound by the long and well established doctrine, that a wife cannot commit a trespass, (so as to be made liable to an action,) in the presence of, or in connexion with her husband. In such case, she is supposed to act under his authority, and he alone must be sued. Where the trespass is committed by the wife alone, the husband must be joined in the action; but the declaration must state that it was so committed by the wife. See 1 *Chitty* 82.—*Bacon*, title *Baron & Feme, Comyn*, (same title,) and also the case of *Chapman et ux. vs. Hardy & ux.* decided in this court.

The action being against both for a trespass committed

by both, and the verdict general, the judgment must be arrested.

The motion is granted.

Justices *Nott* and *Huger*, concurred.

Peareson, for the motion.

Clark & Buchanan, contra.

THE EXECUTORS OF AARON CATES vs. JESSE WADLINGTON.

There is no legislative act in this state declaring which, or whether any, of our rivers are to be considered as public or navigable.

The rule of the English common law, that no river is navigable except where the tide ebbs and flows, is not applicable to this country; (a.) but that cannot be considered a navigable river, the natural obstructions of which prevent the passage of boats of any description whatever.

A river that is merely *capable* of being made navigable is considered, as respects the owners of the adjacent lands, as a mere imaginary line, the claim of each extending to the center of the bed, (*usque ad filum aquæ.*) But an individual has not such an exclusive right to a river which is capable of being made navigable, that the legislature may not declare it to be a public highway, whenever the obstructions are removed, and it becomes fit for public use.

The public may use the waters for the purpose of navigation; but that does not impair the right of the individual to the soil and use of the water, as far as is consistent with the right of the public.

A purchaser must be supposed to know as well as the seller what right and title an individual can have to a navigable river. (b.)

• Newberry, Spring Term, 1822.

THIS was an action of debt on bond. Defence, a failure of consideration in part, for which the defendant was entitled to a deduction.

It appeared in evidence, that *Aaron Cates*, in his life time, was seized and possessed of a tract of land, lying on both sides of Enoree river, which by his will, he directed his executors to sell. Pursuant to the will, they had the

land divided and sold in several lots. The defendant purchased and received titles for one lot or tract, lying on the north east side of the river. The words of the deed, or so much of it as it is necessary to notice, are as follows : "do grant, bargain, sell and release unto *Jesse Wadlington*, all the right and title, which the said *Aaron Cates* had at the time of his death, in and to all that tract or parcel of land containing four hundred and forty three acres, (more or less,) situate in the district aforesaid, on the north east side of Enoree river ; and hath such shape, metes and bounds as by a reference to a resurvey plat thereof, hereto annexed, appears."

Annexed to this deed, was a plat which was represented to include one half of the river. At the bottom of the plat, was a certificate of a surveyor in the following words : "I have admeasured and laid out to *Jesse Wadlington*, a tract of land containing 443 acres, including one half of the river ; it being parts of several tracts granted, &c. situated in Newberry district, on Enoree river ; bounded by lines running N. W. and N. E. on *James Wadlington's* land ; N. W. and N. E. and E. on said land, &c. W. on part of said *Cates* land to the river ; thence with the river as boundary to the beginning."

The bond in question was given for the purchase money of this land. It was contended on the part of the defendant, that the plat by reference became a part of the deed. And that by platting in one half of the river, the plaintiff had undertaken to convey it. That the river Enoree, was *capable* of being made navigable, though it was admitted that at present it was not so. And that rivers *capable* of being made navigable, are not subjects of grant nor private property. The defendants, therefore, were entitled to a deduction for the number of acres of river included in the plat.

The jury, under the direction of the court, found a verdict for the plaintiff, for the whole amount of the bond.

This was a motion for a new trial on the following grounds :

1st. That streams capable of navigation, or which may be made navigable, are not the subject either of grant or private property.

2nd. The plat and deed taken together, did convey to the defendant, one half of the river.

3rd. Misdirection of the court, on the two first grounds, and in further deciding that the right of private property may be acquired and held in streams susceptible of being made navigable, until the state actually makes them navigable.

4th. If the deed did not convey one half of the river, yet as it appears the number of acres covered by the water was computed in the plat, and the discount was for the amount of the value of land covered by the water, it ought to be allowed either as a discount, or on the merits as a plain obvious mistake.

Mr. Justice *Nott* delivered the opinion of the court.

We have no legislative act declaring which, or whether any of our rivers are to be considered as public or navigable rivers. In England, it appears that by the rules of the common law, no river is considered navigable, except where the tide ebbs and flows, (*Davie's Reports*, 152, 157.) But that rule will not do in this state, where our rivers are navigable several hundred miles above the flowing of the tide. And there are some rivers in England, (as lord *Hale* expresses it,) "whether they are fresh or salt, whether they flow or reflow or not, are *prima facie* publici juris, or public highways, &c." (*Hargraves Law Tracts* 9.) The same author observes that fresh rivers, of what kind soever, do of common right belong to the owners of the adjacent soil; so that the owners of each side, have of common right the propriety of the soil, and consequently the right of fishing *usque ad filum aquæ*. (*Do. 5. Carter et al. vs. Murcot et al. 4 Burrows*, 2162.) And although we cannot define by technical terms, what constitutes a navigable river in this state, yet I presume we may venture to say that cannot be considered a navigable river, the na-

tural obstructions of which prevent the passage of boats of any description whatever. Nothing more is contended for on the part of the Enoree river, than that it is capable of being made navigable, but not that it is so now. It must, therefore, be considered as respects the owners of the adjacent lands, as a mere imaginary line. The claim of each extends to the centre of the bed; and *cujus est solum ejus est usque ad coelum*. If, therefore, the plaintiffs had actually conveyed one half of the river in so many words, they would not have conveyed more than they were entitled to convey. But the deed in this case, is cautiously drawn. It contains no warranty; and the plaintiffs have conveyed nothing but *the right and title* which the testator had at the time of his death.

I do not mean to say that an individual has such an exclusive right to a river which is capable of being made navigable, that the legislature may not declare it to be a public highway, whenever the obstructions are removed, and it becomes fit for public use. The public may use the waters for the purposes of navigation; but that does not impair the right of the individual to the soil, and the use of the water as far as is consistent with the right of the individual.

But admitting this to be a navigable river, I am not prepared to say it would affect the relative rights of these parties. I have already remarked that this deed contains no covenant of warranty. The plaintiffs have conveyed nothing more than the right and title which the testator had at the time of his death. And a purchaser must be presumed to know as well as the seller, what right and title an individual can have to a navigable river.

The defendant purchased by certain metes and bounds; and is therefore entitled to all within those metes and bounds. If the river be a part, he is entitled to all the interest which the testator had in it, and no more. The testator had a mill on the river. The defendant has had quiet possession and enjoyment of it. He still continues to enjoy it, and is not likely to be disturbed.

I have considered all the grounds of defence together, without a particular reference to each. And I am satisfied that the motion ought not to prevail.

The motion must be refused.

Justices Colcock, Richardson, Huger and Gantt, concurred.

O'Neill & Johnson, for the motion.

Bauskett, contra.

(a.) See *Carson vs. Blazer*, 2 Binn. 475; or *Wharton's Dig. Tit. Land*, 11.

(b.) "Warrandice," (warranty) says Erskine, (*Law of Scotland*, B. 2, Tit. 3, Sec. 12,) "cannot extend to burdens which may affect the subject after the grant, whether they shall arise from misfortune, (e. g. inundation,) or from statute: For the receiver, as he has the whole benefit arising from its improvement after that period, must run all the hazards of its deterioration. Nay, this doctrine holds where the supervening burden is imposed under the authority of a public law, prior to the grant, unless the receiver, who is presumed to know the burden which by law, may be imposed on the subject, has taken care to secure himself against it by express warrandice." See note c. to *Bond vs. Quattlebaum*, infra. R.

J. P. BOND vs. JOHN QUATTLEBAUM.

It is now a settled rule, that where a person has been evicted of land, or what amounts to the same thing, where he is deprived of it by a paramount title in another, although there has been no eviction, he is entitled to recover back the purchase money with interest, and nothing more. (a.) But there may be cases where the rents and profits in the mean time, will take away the claim of the party to interest. One tract calling for another as a boundary, precludes the idea of running into it.

Every person accepts a grant upon the faith of the public, and not of the grantee. The grantee is not supposed *prima facie* to know any thing more of it than what appears upon its face; and of that, the purchaser from him, is supposed equally competent to judge.

It may be laid down as a general rule, that when a person sells land by the metes and bounds of an original grant, if the purchaser gets all

the land embraced by the grant, even though the lines shall be closed in a different manner than was contemplated by the parties, or should even contain less than it purports to contain, the purchasers can have no recourse to the seller, except upon some *special* covenant or intentional misrepresentation.

If a deduction is to be made for a particular piece of land, it must be according to the price at which it was estimated at the time of the sale. And if the contract was for a gross sum, for all the land, without setting a specific value on each or any particular tract, then the deduction must be in proportion to its relative value and importance, when taken in connection with the whole.

A conjectural loss which ~~may~~ or may not be sustained by reducing the profits of a mill cannot be taken into consideration, as it would be violating the rule, that the deduction should be made with reference to the value of the land at the time of the sale, (i. e. the purchase money.)

Consequential damages *it seems*, have never been allowed to be set off in any case; (*b.*) there must be an actual failure of consideration or the defence cannot be supported.

So far as the defendant can show that the object of his purchase has been actually defeated, he is entitled to a deduction, and no farther. (*c.*)

Lexington, Spring Term, 1822.

THIS was an action of assumpsit on a note of hand, given for a body of land consisting of a number of tracts, lying contiguous to, and adjoining each other. The defendant claimed a deduction on account of a deficiency of land, defect of title, &c.

It was contended,

1st. That in two instances the lines of the adjacent tracts so intersected or ran into each other, that part of the land had been twice sold.

2nd. In another, that one line had upon actual measurement, been found much shorter than it was represented to be in the deed, by which the defendant had been deprived of about eighty acres of land.

3d. That to one tract, the plaintiff had no title.

4th. That by the loss of that tract, his mill would be destroyed, or the profits much diminished, by reducing the water which flowed back up in the land.

The jury found a verdict of five hundred dollars for the defendant; which in effect, exonerated him from the payment of the purchase money, gave him all the land and five hundred dollars for accepting of it.

This was a motion for a new trial, on the ground that the verdict was contrary to evidence.

Mr. Justice *Nott* delivered the opinion of the court.

It is now understood to be a settled rule of law, that where a person has been evicted of land, or what amounts to the same thing, when he is deprived of it by a paramount title in another, although there has been no eviction, he is entitled to recover back the purchase money with interest, and nothing more. There may perhaps be cases, where the rents and profits in the mean time, will take away the claim of the party to interest.

It is only necessary, therefore, to lay down the rule to see at once that a new trial must be granted in this case. It was found upon a resurvey of the land, that there was left to the defendant a greater quantity of land than he had purchased, notwithstanding all the deductions of which he complains; so that the verdict in fact, restores to him the whole of the purchase money, gives him more land than he originally expected, and five hundred dollars in addition. Such a verdict, it is obvious, cannot be supported. It is, however, necessary to go somewhat more into a detail of the principles by which this case is to be governed for the instruction of the court and jury, to whose decision it is again to be submitted. With regard to the first ground of defence, this court are of opinion that by the true construction of the deed, there is no such intersection of the lines of the adjacent tracts, as the defendant supposes. The conveyance of the tract belonging to *Charity Allen* and family, as also that of the *Livingston* tract, calls for land as a boundary with which it is supposed to interfere. Calling for it as a boundary, excludes the idea of running into it. The deduction, therefore, claimed on that account cannot be allowed.

The second item stands upon ground equally untenable. The plaintiff sold the land according to the metes and bounds of a certain grant, exhibited at the time. In closing the lines of that grant, one line is found to be shorter by about thirty chains than it was represented to be in the grant. And the defendant contends that he is entitled to a deduction for the price or value of all the land which would be embraced by the extension of that line to the whole length called for. In answer to which, I think it may be laid down as a general rule, that where a person sells land by the metes and bounds of an original grant, if the purchaser gets all the land embraced by the grant, even though the lines shall be closed in a different manner than was contemplated by the parties, or should even contain less than it purports to contain, the purchaser can have no recourse to the seller, except upon some *special* covenant or intentional misrepresentation. Every person accepts a grant upon the faith of the public and not of the grantee. The grantee is not supposed *prima facie* to know any thing more of it than what appears upon the face; and of that, the purchaser from him, is supposed equally competent to judge. In this case, the defendant has all the land contained in the plaintiff's grant, and therefore has no right to complain. But this part of the defence stands upon still weaker ground. The defendant has never been disturbed in the possession of this land. He has shewn no outstanding paramount title. Nor does it appear that the plaintiff had not a good title to all the land which the defendant contends is included in this part of his deed. But that is not all. The reduction of this line is occasioned by the extension of another, which gives him at least double the number of acres which the grant was supposed to contain at the time of the purchase. So that what he counts upon as a loss, is an actual gain to a greater amount than the loss which he pretends to have sustained.

With regard to the third item, the defendant has been more successful. He has shown a subsisting out standing title in *Charity Allen* and her children, to a part of the

land. He is therefore entitled to a deduction for that land, according to the price at which it was estimated at the time of the sale. And if the contract was for a gross sum, for all the land, without setting a specific value on each, or any particular tract, then the deduction must be in proportion to its relative value and importance, when taken in connection with the whole.

The conjectural loss which may or may not be sustained by reducing the profits of the mill, cannot be taken into the calculation. It would be violating the rule, at first laid down, that the deduction should be made with reference to the value of the land at the time of the sale. The policy of allowing this species of defence, where there has been no eviction, is at least doubtful. If the embarrassments to which it has lead, had been foreseen, it is probable it would never have been introduced. But it has now been too long settled to be questioned. We must take care, however, to keep it within its hitherto prescribed limits. Consequential damages have never been allowed to be set off in any case. There must be an actual failure of consideration, or the defence is not supported. A danger remote or contingent is not sufficient. So far as the defendant can shew that the object of his purchase has been actually defeated, he is entitled to a deduction, and no farther.

The motion for a new trial must be granted.

Justices *Gantt, Colcock, Richardson and Huger*, concurred.

Gregg & Chappell, for the motion.

Stark, contra.

(a.) See *ante*, *Admr. Wallace vs. Talbot*, *Admr.* 466, and note a 468.

(b.) See *ante*, 489, *Massey vs. Craine*. And see note b, to the case of the *Exrs. of Cates vs. Windlington*, *ante*.

•(c.) "Absolute warrandice, (*says Erskine*), in case of eviction, af-

fords an action to the grantee against the grantor, for making up to him all that he shall have suffered through the defect of the right; and not simply for his indemnification by the grantees repayment of the price to him. This obtains, not only in irredeemable, but in redeemable grants; for in both the warrantice strikes against all defects in the right itself; yet as warrantice is penal, and consequently *stricti juris*, it is not easily presumed, nor is it incurred from every light servitude that may affect the subject. Regularly the grantee, when the eviction is threatened, ought to intimate his distress to the grantor, that he may defend the right granted by himself; but though such intimation should not be made, the grantee does not lose his right of recourse, unless it shall appear, that in the process of eviction he has omitted a relevant defence, or subjected himself to an incompetent mean of proof." (*Law of Scotland*, book 1, title 3, section 13.)

See also *Dictionary of Scotch Law*, word, warrantice.

EX PARTE, SPENCER J. MANN.

Where a verdict was obtained in 1810, for a certain sum with interest from 1808, but no judgment entered up, and in 1815, an act was passed allowing interest on all judgments on debts that bore interest, until paid, and in 1820, a motion was made to enter up judgment (which had been neglected,) *nunc pro tunc*, the Court Held, that interest could only be collected on the execution issued upon such judgment, from 1808, till 1810, the time when the verdict was rendered.

This was an appeal from a decision made by Mr. Justice Gantt, at Chambers, September 26, 1821.

Motion to set aside execution for irregularity.

IN February Term, 1810, for Charleston district, Joshua Brown obtained a verdict *vs. Spencer J. Mann*, for the sum of \$1640, with interest from 1st. January, 1808. No judgment was had on said verdict, before the ——— day of ———, when under a judicial order, leave was obtained to enter up judgment thereon *nunc pro tunc*. Under this judgment, (rendered after a lapse of ten years from the time of finding the verdict,) interest had been calculated upon the amount recovered, from the time fixed by the verdict, (1st January, 1808,) to the time of issuing the *fi. fa.*

with instructions, to extend the calculation of interest, until the execution was satisfied.

Mr. Justice *Gantt* delivered the opinion of the court.

I will not, upon the question submitted for my consideration, undertake to decide, whether the plaintiff by his neglect to enter up judgment at an early period, and when it was competent for him to have done so, has debarred himself from all right of interest on this debt subsequently to the verdict, but I am clearly of opinion, that however that question may eventually be decided, he cannot under the present execution, legally claim more than the \$1640, (the amount recovered,) with interest from the 1st of January, 1808, and to the term when the verdict was obtained. To that extent and no further, can the judge's order allowing leave to enter up judgment, be carried. The order is referential; having relation to the facts as they existed when the act ought to have been done, and is to be considered as the judgment of the court before whom the case was tried. It was then the plaintiff had a *right* to enter up judgment, and the judge's order subsequently obtained for that purpose, is no more than a recognition of the same, with permission to supply the omission. Had the judgment been rendered of the term the verdict was obtained, the plaintiff could not, ten years afterwards, have taken out an execution for the interest money subsequently accruing; but to entitle himself thereto, would have been driven to his action of debt on the judgment. Nor can I readily conceive how the neglect on the part of the plaintiff to enter up his judgment regularly, can place him in a better situation than if he had. I do not consider the present judgment as embraced by the act of assembly, of 1815, allowing interest on judgments. True it was actually entered up after the passing of that act, and would seem by the words of the act, to be entitled to interest from that time; but having relation to a period of time long before its enactment, cannot by any fair construction be considered as falling within the scope of its provi-

sions. I think the plaintiff ought not to be delayed from enforcing his execution to the extent which he may lawfully claim, and that is for the amount recovered, say sixteen hundred and forty dollars, with interest thereon from the 1st. January, 1808, to — February, 1810, (the term when the verdict was found,) and costs. All beyond, claimed by way of interest on this execution, is considered as being at least irregularly demanded, and for all such monies, the execution is hereby ordered to be staid indefinitely.

Justices *Colcock*, *Richardson* and *Huger*, concurred.

De Saussure, for the motion.

Gregg, contra.

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ACCOUNT.

1. The liquidation of an account by a note, though it should have been, by the note of a third person, unless expressly received in payment, does not destroy the open account.—*Barelli, Torre & Co. vs. Brown & Moses*, 449
2. Interest has been too often allowed upon a balance of accounts, after it has been acknowledged, to be now disputed, *Id.*
3. Where the plaintiff was a shop keeper, and sued the defendant on an open account, most of the items of which were for *spirituous liquors*, he may nevertheless recover his account, and his books are admissible to prove it. Nor is he bound to prove that he had a licence to retail spirituous liquors.—*Herlock vs. Riber*, 481

ACTION.

1. A party may bring an action upon a magistrate's decree, although the execution had issued, and property levied on, but where the following endorsement was made by the constable upon the execution, "no further proceedings, the property given up to defendant, as there were executions at the sheriff's office binding the property, of which notice was given me."—*Todd vs. Williamson*, 148
2. Where the plaintiff sold the defendant \$1553 02 worth of cotton bagging, and upon the defendant's refusing to comply with the contract, had the bagging sold at auction, which produced \$1053 65, and brought his action for \$499 37, the difference, the court *Held*, that the plaintiff was within the jurisdiction of the City Court, which extended to

\$500; though it was objected that the plaintiff by his own showing, was not within the jurisdiction: as he ought to have brought his action for the whole amount of the purchase money of the bagging. The court also *Held*, that the re-sale of the goods by the plaintiff at auction was not a rescision of the contract with the defendant; but that he could still maintain his action for the difference.—*Jackson vs. Watts*, 288

3. An owner of land, through which a water course runs, is entitled to an action against a person for diverting the water from his land.—*Haymes vs. Gault*, 543

ADMINISTRATOR.

See Executor & Administrator.

AFFIDAVIT.

See Bail.

AGENT.

See Factor & Agent, Co-partners and Co-partnership. Bills of Exchange.

ALIEN.

1. Where the wife was an alien, but had given notice and taken the oath of her intention to become a citizen, but died before she became duly naturalized, the court *Held*, that her husband could not inherit land through her.—*Richards vs. McDaniel*, 187
2. The records of admission to naturalization, not mentioning that the person had three years previously declared his intention of becoming a citizen, is not sufficient; because the court will presume that the court which admitted the alien, must have received evidence of that fact at the time, and admitted the party as the law directs. *Id.*

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AMENDMENT.

See Practice.

APPEALS.

See Practice.

ARREST OF JUDGMENT.

See Pleas and Pleading.

ARBITRATION AND AWARD.

1. The parties referred their disputes to five arbitrators. Award by three for the plaintiff. Two dissented. An action was brought on the award, to which the defendant demurred, because the five arbitrators should have concurred. Demurrer overruled.—

Pearson vs. Black, 137

ASSIGNMENT.

See Lien, 3, 4. Bills of Exchange, 3, 4, 5.

ASSIGNEE.

See Practice.

ASSUMPSIT.

1. In an action of *special assumpsit*, to recover back the price paid for any property, which proves unsound, there is no necessity to prove a return of the property or any rescission of the contract; if general *indebitatus assumpsit* be the action, it is then necessary.—

Banks vs. Hughes, 537

ASSETS.

See Exor. & Admr. and Lien 3.

ATTACHMENT.

See Pleas and Pleading 20.

1. A judgment and execution in attachment against the garnishee will not be set aside on the ground of the negligence or ignorance of his attorney. And it seems his only recourse is against his attorney, if he neglect to do his duty. And an order made by the circuit court to set aside the judgment, and to give the garnishee time to make his return, will be set aside.—

Foster vs. Jones, 116

2. The garnishee has no right to question the regularity of the proceedings against the absent debtor.

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3. As a security to the absent debtor, the plaintiff in attachment is required to make oath to the debt or sum demanded; but it seems the oath is not required to be recorded or filed; it is only a part of the evidence on which the court is to bottom its judgment.

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4. Upon the trial of an issue between the garnishee and attaching creditors of the absent debtor, as to the right to certain property attached, the wife of the absent debtor cannot be admitted to give evidence.—

Forrester vs. Creditors of Guersineau, 304

5. The court also *Held*, that on the trial of the issue, in which the garnishee stood as plaintiff, and the creditors as defendants, that an order could not be granted to strike one of several such attaching creditors off the record in order to make him a witness for the others; although he assigned over the judgment which he had recovered against the absent debtor to a third person, who gave him a release.

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6. The court in a doubtful case, will not, on motion, set aside a foreign attachment, on affidavit that the debtor was in the state at the time of issuing the attachment; nor upon affidavit that the debtor within a year and a day had taken the benefit of the insolvent debtor's act, which act prohibits any suit from being brought against such debtor for a year and day, and which year and day had not expired before the suing out of the attachment.—

Shrewsbury vs. Pearson, 331

7. No proceedings are necessary to be had against the garnishee who makes no return to the attachment, until judgment is recovered against the absent debtor; and then upon

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- motion, *it seems*, even without notice, judgment may be entered up against the garnishee; therefore, a garnishee who has made no return, and against whom no proceedings have been had for four years, but during which time the judgment had not yet been recovered against the absent debtor, cannot be examined as a witness on the part of such absent debtor, on the trial of the case in which he had been garnished.—*Richardson vs. Winfield*, 403
8. It seems that the act of the legislature making a copy writ, left at the residence of the defendant equivalent to personal service, does not include writs of attachment, 16
9. An attachment creates a lien, which nothing subsequent can destroy, but the dissolution of the attachment, on the conditions mentioned in the act; therefore a junior execution must be postponed to it.—*Goove and Dunavant vs. McDaniel*, 480
10. A magistrates jurisdiction extends in cases of domestic attachments, to §20, and is not confined to 13.—*Roberts vs. Brown*, 448
11. There are three cases in which a magistrate may issue attachment; (1) where the defendant is about to remove his effects; (2) where he is removing out of the county privately and (3) where he so absconds and conceals himself, that the ordinary process of law cannot be served upon him.—*Hugood vs. Hunter*, 511
12. A recital of the affidavit in a writ of domestic attachment, in these words, were held insufficient, and on motion the court set the attachment aside, viz. "That the defendant was about to remove from and without the limits, or so absconds and conceals himself, that the ordinary process of law cannot be served upon him." The word *or*, renders the state of facts uncertain, 16
13. It *seems* necessary that the oath taken before granting a domestic attachment, should be recited in the writ; as it must appear upon the face of the process of all limited jurisdictions, that the case is within its bounds, 16
14. An affidavit on filing a declaration in attachment, that the defendant was indebted to him, the plaintiff on a note, (stating it,) that no part of the same was paid, and that he, the plaintiff, was indebted to the defendant, *some small amount, but he did not know how much*, contracted since the note was given, was *Held* by the court a sufficient affidavit, under the act.—*Turner vs. McDaniel* 552

ATTY. AND CLIENT.

See Attachment 1. Fees.

1. In suits requiring great professional labour, where much time must necessarily be consumed, and diligence and skill required, in the preparation and management of them, an attorney may rightfully and legally charge, by way of counsel fee, a sum proportioned to the value of the services; and which a jury of the country, upon evidence before them, are competent to ascertain and decide upon.—*Duncan vs. Ex'rs. of Yancey*, 149
2. Where an attorney was convicted of an attempt to suborn a witness to commit perjury, the Constitutional Court ordered him to be stricken from the roll of attorneys.—*State vs. Holding*, 370

AVERMENT.

See Pleadings and Pleading, 9. Deed 2.

BAIL AND BAIL BOND.

1. The defendant in an action on a bail bond cannot be liable to a greater extent than the principal was when the bail became fixed; and the original judgment and cost at

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- the time of the return of *non inventus* is the amount for which the bail is liable.—*Murden vs. Perman*, 128
2. And the bail is only liable for interest on the original judgment from the time when his liability became fixed by the return of *non inventus* on the *ca. sa.* against the principal; unless the judgment had been on a penal bond, where the interest would continue to run on, and then he would, perhaps, be chargeable with the accumulated amount, *Ib.*
3. An affidavit stating the defendant to be indebted to the agent as attorney for the plaintiff, is a sufficient affidavit to hold the defendant to bail in an action by the plaintiff.—*Jackson vs. Watts*, 288
4. Where a debtor, in the prison bounds, petitions for the benefit of the *insolvent debtor's act*, and submits his schedule, and a suggestion of fraud is filed against him, under which he is found guilty by the jury and remanded to gaol, the bail is thereby discharged; for by such false schedule he is disabled from taking the benefit of either the *prison bounds act* or the *insolvent debtor's act*.—*Dixon & Co. vs. Vanezara*, 373
5. It seems that wherever the law interferes, and in any manner takes the principal from the custody of the bail, it is considered as a surrender, *Ib.*
- BAILEE AND BAILMENT.**
See Ferry. Inkeeper.
- BARON AND FEME.**
See Pleas and Pleading 2.
1. Where the wife, whose husband died and left his estate to her for life, remainder to his nephew, died leaving a *separate estate of her own*, the court *Held* that the estate of her husband was not liable for her funeral expenses; but that *her own estate* was bound for them.—*Mease vs. Wagner*, 595
2. A husband, whose wife in his presence retails spirituous liquors, without a license, is liable for the same.—*State vs. Gearing*, 575
3. A wife cannot commit a trespass (so as to be made liable to an action) in the presence of, and in connexion with her husband. In such case, she is supposed to act under his authority, and he *alone* must be sued.—*McKeown vs. Johnson*, 578
4. Where the trespass is committed by the wife alone, the husband must be joined in the action; but the declaration must state that it was so committed by the wife, *Ib.*
5. An action on the case, for jointly enticing and harbouring a slave, will not lie against the husband and wife; the declaration should state the enticing and harbouring to have been done by the wife solely, *Ib.*
- BILLS OF EXCHANGE AND PROMISSORY NOTES.**
See Co-Partners.
1. Where the defendant, who was a sea captain, bought goods, and was to have given his note with A. as security for the same, but went to sea without giving his note, and the agent of the vendor received the note of A. alone, "which when paid, was to be in satisfaction of the defendant's debt," the Court *Held*, that it was not a discharge of the defendant.—*Prescot vs. Hubbell*, 94
2. Where several witnesses swore that it was a custom when the vendor of goods received a note of the consignee without the endorsement of the purchaser, that the purchaser became discharged, and the maker of the note only liable; the Court *Held*, that it was a custom so unreasonable, that it could never supersede the law to the contrary, *Ib.* 95.

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3. An order drawn upon an agent in possession of funds, out of which it is to be satisfied, when accepted, fixes the funds irrevocably; and is a good assignment thereof. And the funds do not become assets upon the death of the drawer.—*Napier & Co. vs. Ex'rs Lacoste*, 106
4. Where a person drew an order upon his agent, who was in possession of funds for the purpose of selling, upon which the agent himself had a lien, and the order was accepted, and the drawer then died, the Court *Held*, that it was essentially an assignment for valuable consideration, and that the agent might sell the property, retain his debt, and pay the order, without making himself liable as executor *de son tort*, *Id.* 107
5. At common law, no chose in action is assignable; and the statute of Ann, and our Act, making notes payable in money assignable, do not include notes payable in paper medium. And a verdict obtained by an assignee will be arrested.—*Lange vs. Kohne*, 115
6. The drawer of a note is not bound to refund to the endorser any costs which he may be subject to, in consequence of his endorsement when he paid off the note as soon as it became due.—*Richardson vs. Præsnall*, 192
7. Where a note is endorsed after it becomes due, demand must be made of the drawer, and notice of non-payment must be given to the endorser, to make him liable.—*Poole vs. Tollenon*, 199
8. Where the plaintiffs, consignees at Wilmington, wrote to the defendant, owner at Charleston, that his ship would need some repairs, but did not know the amount, but perhaps 6 or \$700, and that the captain would write the particulars; and also said that the captain would want funds to have the same done, and requested to know if they, the plaintiffs, should draw for the disbursements; and in answer, the defendant directed that the Captain should draw in favor of the plaintiffs for the disbursements; and the disbursements afterwards turned out to be \$2,295 85; the court, *Held*, that the captain was the legally constituted special agent of the defendant; and that the defendant was bound to pay a draft he drew in favor of the plaintiffs for the full amount of the disbursement.—*Burgin & Co. vs. Flinn*, 316
9. Where the defendant drew a bill, the 11th of June, on A. in N. York, in favor of the plaintiff, payable *three days after sight*, and some time during June, the plaintiff went to New-York, and resided in the house of A. until the 24th of August, when the note was protested, and notice of non-payment and failure of A. was sent to the defendant, the court *Held*, that the plaintiff, by his laches lost all claim upon the defendant, the drawer, and of course could recover nothing.—*Fernandez vs. Lewis*, 322
10. Where a demand on the drawer of a bill of exchange cannot be made, the law does not dispense with notice to the endorser. The circumstances which prevent the demand and notice of non-payment, should still be given.—And such notice should be given in as short a period after ascertaining that the demand could not be made, as if the demand had been made, viz. as soon as shall be conveniently practicable.—*Pike vs. Young*, 339
11. Where the holder lived on James Island, and the drawer in Charleston, and the note became due on the 26th October, and notice not given until the 16th of November, the Court

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Held, that the notice was not given in time. *Ib.*

12. Where a person gave a note of \$500, for valuable consideration, payable sixty days after date, and when it became due, in order to obtain the further time of sixty days, gave his due bill for fifty dollars, and took a renewed note for \$500, payable sixty days after date, the court *Held* the transaction usurious, and that the note of \$500, as well as for \$50, was void under the Statute; for, it seems, every renewal of a note is a new contract.—*Motte vs. Dorrell*, 350

13. A note in these words, "due T. N. on demand, three hundred dollars, &c." *Held*, that interest would only commence from the time of a demand.—*Cannon vs. Beggs*, 370

14. One partner, after dissolution, cannot bind the other by drawing a note in the co-partnerships name, unless he has a particular power vested in him for that purpose.—*Bank So. Car vs. Humphreys and Mathews*, 388

15. Nor can one of a firm, which is dissolved, renew a note in the bank, in the co-partnerships name; although, during the co-partnership, the firm had written a letter to the President and Directors, requesting to be permitted to renew their note, until the expiration of a certain time, during which time this renewal was given, but subsequent to the dissolution. It was *Held* not a power given to affix the name to a note of the partnership after the dissolution. *Ib.*

16. Where the defendant accepted a bill of exchange, upon condition that he sold certain goods of the drawer before the bill became due, which goods, before the bill became due, were attached by a creditor of the drawer in the hands of the acceptor, and before they were sold; the Court *Held* that the defendant was

not bound by his acceptance.

—*Browne & Co. vs. Coit* 406

17. The liquidation of an account by a note, though it should have been by the note of a third person, unless expressly received in payment, does not destroy the open account.—*Burrell & Torre vs. Brown & Moses*. 449

BILL OF SALE.

See Evidence.

BOND.

See Need.

1. Where an officer, who is elected annually, gives a bond for the faithful discharge of the duties of his office, his securities are bound *only for one year*, although there is no time specified in the bond, and although he should be re-elected several years in succession.—*S. Car. Su. vs. Johnson*, 41

2. Twenty years without any payment or acknowledgment, will raise the presumption of the payment of a bond; but even then the presumption may be rebutted by any circumstances which will tend to shew that it was not paid. Less than twenty years, with other circumstances going to show that there was payment, may be sufficient.—*Levy vs. Hampton*, 145

3. The Court of law can make no distinction between two joint obligors, where there is no distinction made in the bond itself. *Ib.*

4. A bond bearing interest from a period anterior to its date, is not usurious. *Ib.*

5. A co-obligor is not like an indorser, absolved from liability by the negligence of the obligee, although he may be only a security; for the common law makes no difference between co-obligors; they are both absolutely and unconditionally liable. *Ib.*

6. The plaintiff in an action on a penal bond, cannot recover more than the penalty where

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the interest exceeds it.—*Bonsall vs. Taylor*,

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7. In debt on judgment upon a penal bond, the plaintiff can recover interest beyond the penalty.

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BOOKS.

See Evidence.

CAVEAT EMPTOR.

1. The rule of *caveat emptor* does not apply to sales by the master in chancery, for he being the agent of the parties, for whose benefit the sale was made, they are as much bound by his representations as they would have been by their own.

—*Tungus vs. Fluid*,

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CHARLESTON & ORDINANCES

1. The jurisdiction of Charleston extends to the northernmost line of Boundary-street.

—*Horiston vs. City Council Charleston*,

345

2. The act of 1764, giving powers to the commissioners of the streets in Charleston to make drains and assessments to pay for the same, has been repealed by the acts of 1783 and 1785; and the city ordinance of 1806, is now in force, and the only rule of action for the City Council in making drain assessments.—And the court granted a prohibition to restrain the council from levying a fine assessed in a different manner from that provided by that ordinance

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S. P. Cruickshank vs. Council, 380

3. By an ordinance of the City Council of Charleston, laying a tax upon different property, among many things, a tax was laid upon "all profit or income arising from the pursuit of any faculty, profession, or occupation, trade or employment," except, "salaries of the judges or other public officers, exempted from taxation, or not taxed by the legislature, &c.; nor the income or profit of any person or persons

rated at a less sum than \$800; and the second clause of the said ordinance then ordains that in "making the assessment on the *real and personal* property described in said ordinance, (excepting money at interest,) the assessor shall estimate the same at one half the value thereof." The court *Held*, that the salary of an officer of the bank was included under the second clause as *personal property*, and that the tax could only be laid on the half of such salary, which half, if it should be less than \$800, would not be subject to the tax at all.—*Lining et. al. vs. City Council*,

345

4. A person cannot, by his own oath, exculpate himself from the penalty, under the city ordinance of Charleston, against riding or driving faster than a walk in turning the corner of a street.—*City Council vs. Dunn*,

333

5. Under an ordinance of the city of Charleston, it is provided, "that the owner or tenant of any house, whose chimney shall take fire, and blaze out at the top shall be subject to a fine of not less than fifty, nor more than one hundred dollars." It appeared that the chimney in this case, blazed out in consequence of a negro servant carelessly throwing into the fire a band box filled with pieces of silk, crape, chip and shreds of work, and that the blaze was but momentary; the court *Held*, that the owner or tenant was still liable to the penalty.—*Council vs. Palmer*, 342

6. The power of the City Council to lay taxes and assessments, for the purposes of pavements, drains, &c. in Charleston, without the intervention of a jury, is as constitutional as the general power of the Legislature to lay taxes upon the people of the state. It is a part of the general sovereign power conferred upon the

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corporation.—*Cruickshanks vs. City Council*, 360

7. Under a general power to the City Council to make such assessments on the inhabitants, and to appoint all such officers as may be necessary and requisite for carrying into effect the power conferred, it is not a valid objection to an assessment that it was made by the officers of the council, and not by the council itself; for the City Council, within the limits of the city, is in the nature of a legislative body, for the purpose of devising and making all by-laws, and those acting under them, ministerial officers or agents, for carrying them into execution; besides these assessments are submitted, first, to the approbation of the Council and approved, and any one has a right to make his objections before the Council, *Ib.*

CITY COURT OF CHARLESTON.

1. It is sufficient to shew that the parties all lived in the city of Charleston, and that the proceedings were carried on there, to give jurisdiction to the City Court, without proving that the waste was committed there.—*Thomas vs. Dyott, Adm'r*, 76
2. A citizen and resident of Rhode-Island may sue a citizen of South-Carolina, resident of Charleston, in the city court of Charleston.—*Green vs. Smith*, 324
3. Indeed it seems that any person competent to sue, may institute an action in the city court against *any* inhabitant who resides within the city, to the extent of (\$500) the jurisdiction conferred, *Ib.*
4. It seems also that where the defendant resided in Charleston, and ordered goods to be sent to her, that the contract will be considered as arising in Charleston, *Ib.*

COMMON CARRIER.

See Ferry.

1. Where two vessels were passing in a narrow channel (about 400 yards across,) both going the same way, and it became apparent that they were about to run afoul of each other, it was the duty of the vessel to windward to keep away; especially when she was warned of the danger; and the owners of such vessel not giving the way, and who might have given the way, are liable for the losses sustained by the vessel so run afoul of.—*Marsh & Howinads. Ex'r Blythe*, 360
2. Where two vessels meet in such a situation that neither can avoid the collision, it is a danger of the sea, but not otherwise.

Whether peril of the sea or not, is a question for the jury, *Ib.*

3. A motion in arrest of judgment, because the declaration neither stated the day nor the year, when the wrong complained of was committed, and that it did not state that any definite quantity of rice was lost, but merely stated that — bushels were received on board and lost, comes too late after verdict. The advantage should have been taken by pleading. The day of the loss and the quantity lost were proved on the trial. *Ib.*

CONGRESS.

See Money.

CONSIGNEE.

See Factor & Agent.

CONSOLIDATION.

1. Where the plaintiff brings two summary processes upon two distinct notes, against the same defendant, the court will not consolidate them if the amount of both notes exceed the summary jurisdiction.—*Parrott & Felth vs. Green*, 531

CONTINUANCE.

See Practice.

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1. It is at the discretion of the Court to continue a case on the part of the State.—*State vs. Patterson*, 177

CONSTITUTION.

See Pardon.

1. The tenure by which an office is held, does not depend upon the commission which the governor may think proper to give. It is only evidence of the appointment. The tenure must depend upon the provisions of the act creating the office, or upon the Constitution.—*State vs. Jeter*, 233
2. No office exists in this state by prescription, *Ib.*
3. As the Constitution has not prescribed the tenure by which a solicitor shall hold his office, the act creating the office is the proper source from which that information is to be derived, *Ib.*
3. The act of 1791, has given to the solicitors all the privileges, emoluments and advantages of the Attorney-General, and subjected them to all his duties; and the tenure by which they hold is the same, *Ib.*
4. By the Constitution of 1776, the Attorney-General held his office during good behavior. By the Constitution of 1778, it was declared, that the Attorney-General should hold his office for the term of two years, and until a successor should be appointed. The Constitution of 1776 was repealed by that of 1778, and the Constitution of 1778, as far as it concerns the Attorney-General, was not repealed by that of 1790. The Attorney-General therefore must have held in 1796, under the Constitution of 1778, and the act of the legislature of 1791, giving to the solicitors all the privileges, &c. of the Attorney-General, must have intended to limit the solicitor's office to two years, and until another was appointed, *Ib.* 234
5. A person elected ordinary

under the act of 1812, which limits the duration of office to four years, is in under the constitution, and is entitled to hold his office during good behaviour, although commissioned only for four years.—*State vs. Lyles*, 238

6. Ordinaries, by the third article of the constitution of this state are judicial officers, and hold their offices during good behavior; and where the governor, under the act of 1813, appointed an ordinary to fill a vacancy, although the act authorizes him only to make a temporary appointment until an election shall take place, yet the ordinary being in office, he is in under the constitution, and holds during good behaviour.—*State vs. Hutson*, 240
7. By the constitution, the sheriffs hold their offices for the term of four years; and where the governor, under the act of 1808, appointed a sheriff to fill a vacancy, until an election should take place, such sheriff, being in office, is in under the constitution, and holds his office for four years.—*State vs. McClintock*, 245
8. Where an indictment commenced with "South-Carolina," and not the *State* of South-Carolina, and concluded against the peace and dignity of the "*said state*," and not against the peace and dignity of the *same*, the court *Held*, that it was good and consistent with the 2d section of the 3d article of the Constitution.—*State vs. Anthony*, 285
9. The power of the City Council to lay taxes and assessments, for the purposes of pavements, drains, &c. in Charleston, without the intervention of a jury, is as constitutional as the general power of the Legislature to lay taxes upon the people of the state. It is a part of the general sovereign power conferred upon

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- on the corporation.—*Cruikshanks vs. City Council*, 360
10. Under a general power to the City Council to make such assessments on the inhabitants, and to appoint all such officers as may be necessary and requisite for carrying into effect the power conferred, it is not a valid objection to an assessment that it was made by the officers of the corporation and not by the corporation itself; for the City Council, within the limits of the city, is in the nature of a legislative body, for the purpose of devising and making all by-laws, and those acting under them, ministerial officers or agents, for carrying them into execution; besides these assessments are submitted, first, to the approbation of the Council and approved, and any one has a right to make his objections before the Council, *Ib.*

CONTRACT.

1. In the absence of any contract, the legal presumption is, that the workman is bound to furnish his own tools and machinery.—*Hort vs. Norton*, 22
2. If a workman be employed to do a particular job, and he choose to do some additional work, without consulting his employer, he cannot recover for such work, *Ib.*
3. If the person for whose use goods are furnished be liable at all, any promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds.—*Leland vs. Creyon*, 100
4. Where the defendant being present with L. in a store, verbally promised to be responsible to the merchant for what goods he might let L. have, and the merchant let L. have goods, and charged them to L. in his books, and afterwards was paid part by L. the promise is void under the statute of frauds; although the mer-

- chant made the following memorandum in his book, viz. "The above articles were delivered to L. who was introduced by J. M. C. who agreed to be responsible for what Mr. L. may want in merchandise. Credit was given on said C. becoming responsible," *Ib.*
- Quere?* If such memorandum is competent testimony?—*Ib.* 106, note b.
5. If a person agree to sell land for so much per acre, and afterwards execute titles for the same, by metes and bounds, be it more or less, and take a note for the purchase money, if it turn out afterwards that there is a greater number of acres than was contemplated, the seller shall not recover payment for the over plus. The verbal agreement is merged in the written contract, and parol evidence cannot be admitted to prove any contract different from the written agreement.—*Falconer vs. Garrison*, 209
6. Where the plaintiff sold the defendant \$1553 02 worth of cotton bagging, and upon the defendant's refusing to comply with the contract, had the bagging sold at auction, which produced \$1053 65, and brought this action for the whole amount of the purchase money of the bagging, the court held, that the re-sale of the goods by the plaintiff at auction was not a rescision of the contract with the defendant; but that he could still maintain his action for the difference.—*Jackson vs. Watts*, 288
7. It seems where the defendant resided in Charleston and plaintiff in Rhode-Island, and defendant ordered goods to be sent to him, that the contract will be considered as arising in Charleston.—*Green vs. Smith*, 324
8. Every renewal of a note, it seems, is a new contract.—*Motte vs. Dorrell*, 351

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Quere? If it should not be so considered in cases of judgments confessed and mortgages given to secure an endorser for endorsing notes to be repewed in bank? *Id. in note*, 355

9. Promises made on a consideration that is wholly past, without any new consideration moving to it, are void; but it *seems*, circumstances growing out of, and connected with the original contract, and an infinite variety of others, may constitute a new legal consideration.—*Garrett vs. Stuart*, 514

CONVEYANCE. *See Deed. Notice.*

CO-PARTNERS AND CO-PARTNERSHIP.

1. It is not necessary that a special notice of dissolution should be given to persons who are accustomed to deal with a firm. And it is a question for the jury to decide whether there was such evidence of the dissolution of the co-partnership as to induce them to believe that the party knew it.—*Martin vs. Wulton & Co.* 16
2. Notice published in a Gazette is conclusive on those who have had no dealings with the co-partnership; but as to such as have had dealings, it shall not be so considered, unless under circumstances it appear satisfactorily to the jury that it operated as a notice, *Id.*
3. An authority to one of a co-partnership to settle the affairs, receive and pay the debts, does not warrant him to draw a bill, or give a note in the co-partnership's name, *Id.*
4. One partner, after dissolution, cannot bind the other by drawing a note in the co-partnership's name, unless he has a particular power vested in him for that purpose.—*Bank So. Car. vs. Humphreys and Mathews*, 338
5. Nor can one of a firm, which is dissolved, renew a note in

the bank, in the co-partnership's name; although, during the co-partnership, the firm had written a letter to the President and Directors, requesting to be permitted to renew their note, until the expiration of a certain time, during which time this renewal was given, but subsequent to the dissolution. It was *Held* not a power given to affix the name to a note of the partnership after dissolution, *Id.*

6. Notice of a dissolution of co-partnership, published in a Gazette, which was taken by the bank, was *Held* a sufficient notice to the bank though the defendant had had dealings with the bank, *Id.*

CORPORATION.

Quere.—If a Corporation of one State can maintain an action in another State, in its corporate name?—*Brown, Green & Co. vs. Mints*, 80

COSTS.

1. The fee bill does not allow § 5 36 "for special matter and argument" in a summary process case, as in others.—*Grimes vs. Gowen*, 137
2. Half costs are allowed only upon liquidated demands, and upon 'open accounts.' Where the party has the means of regulating his demand by the sum really due, and chooses to go for more if he recover less than § 50, he is allowed but half costs, but when he has not the means of regulating his demand by any standard, and claims damages to an uncertain amount, as for a breach of warranty, if he recover even less than § 50, the act does not reduce his costs, *Id.*
3. In cases of partition, costs are to be paid by all the parties concerned.—*Gibson vs. Brown*, 162
4. The drawer of a note is not bound to refund to the endorser any costs which he may be subjected to in consequence

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- of his endorsement, when he paid off the note as soon as it became due.—*Richardson vs. Presnall*, 192
5. Where the plaintiff's demand has been reduced by actual payments, to a sum within the *Summary Process* jurisdiction, he must proceed by way of *Summary Process* for the balance; and if he bring his action for the whole, he can recover only the costs of a *Summary Process*. But it is otherwise where there are mutual demands, and the plaintiff's debt is reduced by discount; because he may not know the amount of the defendant's demand; neither can he know that he will avail himself of such defence.—*Levy vs. Roberts*, 395
6. Upon a rule against the sheriff to shew cause why certain money collected for fines inflicted in the court of sessions should not be paid over, the Court *Held* that the sheriff was not entitled to retain 5 per cent. for his commissions upon the amount collected; and that the clause of the county court act under which he made such claim was repealed by the Judiciary act of 1798, and that the act of 1791, regulating the fee bill, repealed all former acts allowing costs, and allowed none in this case.—*State vs. Sheriff of Charleston*, 419
7. In action on the case in the nature of an action for ravishment of ward to try the freedom of a negro, where the jury found a verdict establishing the right of the plaintiff's ward to freedom, but found no damages, the Court *Held* that the plaintiff was entitled to costs.—*Clifton vs. Phillips*, 469
8. Wherever it is intended by a defendant to require security for costs, where the plaintiff resides out of the state, reasonable notice should be given to the plaintiff or his attorney, of such intention, prior to the court at which the cause is to be tried, that no plaintiff may be taken by surprise.—*Disnukes vs. Disnukes*, 552
- Security for cost does not depend upon the defendants putting in bail. 16
- ## COVENANT.
1. Upon a covenant for the lease of a lot, whereon lessee covenanted to build, which buildings, at the expiration of the lease were to be valued by indifferent persons, and at which valuation the lessor was to take the buildings, he paying for the same in one, two, and three years from the expiration of the time; the Court *Held*, that the payment for, was not a covenant precedent to the delivery of, the houses.—*Manigault vs. Carroll*, 91
2. A purchaser of land may maintain an action of covenant on the warranty, (against all persons lawfully claiming or to claim,) before eviction, by showing a paramount title in a third person; but where the plaintiff claimed a tract of land and thinking that the defendant's title was better than his, and, to obtain this outstanding title, purchased this tract, with two others adjoining, and took a deed in the form prescribed by the act of 1795, (containing a warranty as above,) and afterwards discovered that his first title was better than the second, and commenced his action against the defendant, for a breach of the warranty, not being disturbed by the claim of any third person, the Court nonsuited the plaintiff; because it could not be intended that the vendor would give a warranty against the title of the vendee himself, when it was bought for the purpose of protecting that title.—*Biggs vs. Brady*, 552
3. In covenant on a deed for breach of warranty of sound-

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ness of a negro slave, the measure of recovery is to the extent of the injury which the party sustains by the infraction of the covenant, whether it be partial or total, and must necessarily depend on the circumstances of the case.

—*Garrett vs. Stuart,*

514

4. In *special assumpsit*, for breach of warranty, it seems, that the consideration paid, is not necessarily the measure of damages, but, under particular circumstances, a jury may give more; although in most cases it would constitute the best evidence of injury sustained; yet in actions sounding altogether in damages, it seems that the measure of recovery must depend on circumstances,

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5. *Covenant and general indebitatus assumpsit* for money paid by mistake, or a consideration wholly failed, are not to be confounded; in the latter, the consideration paid and interest, is the measure of damages,

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CRIM. CON.

1. Case as well as trespass *vi et armis* is a proper action for criminal conversation.—*Haney vs. Townsend,*

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CUSTOM.

See Bills of Exchange and Promissory Notes,

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DAMAGES.

See Warranty and Interest.

1. In an action of detinue, the damages were laid in the declaration to be only one hundred dollars, and the verdict was for the article detained or its value \$100, and \$100 damages; *Held* that it was not a cause for arrest of judgment, on the ground that the verdict exceeded the amount of damages laid in the declaration.—*Laborde vs. Rumb,*

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2. In an action of debt upon a judgment, which judgment had been for damages to the

amount of the penalty of the bond upon which the action had been brought, the court *Held*, that the plaintiff in his action upon the judgment could recover interest by way of damages beyond the penalty of the bond, upon which the judgment was founded.—*Smith vs. Vanderhorst,*

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3. On a breach of warranty expressed or implied, in the sale of an article, the damages to be recovered must be rateable with the loss; and if a total loss, the whole sum paid, with interest, may be recovered back.—*Egleston vs. Macauley, Executor,*

379

4. Where the verdict is for damages beyond the amount laid in the writ, the plaintiff must enter a *remittitur* for the surplus or a *penore de novo* will be awarded.—*Civens, et. ux. vs. Porteous,*

379

5. No damages are allowed on a judgment in Dower.—*Heyward vs. Heyward, Err.*

386

6. In cases of eviction the price of the land and interest from the time of the purchase shall be the measure of damages; but where the loss is only partial, the party evicted may shew that the part of the land lost is more valuable than the rest, and claim a compensation adequate to the loss; i. e. the relative value and not the average price is the measure of damages.—*Admr. Wallace vs. Talbot,*

466

7. And in action upon such note, given for a tract of land, where a discount was set up, that the wife's dower had not been released, the Court *Held*, that the defendant could be allowed nothing, for the dower; for as the husband is now living, it is only possible that the right of dower may accrue, and a possible injury is not a subject for damages.—*Massey vs. Craine,*

489

8. In *covenant* on a deed for breach of warranty of soundness of a negro slave, the mea-

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- sure of recovery is to the extent of the injury which the party sustains by the infraction of the covenant, whether it be partial or total, and must necessarily depend on the circumstances of the case.—*Garrett vs. Stuart*, 514
9. In *special assumpsit*, for breach of warranty, it seems, that the consideration paid, is not necessarily the measure of damages, but, under particular circumstances, a jury may give more; although in most cases it would constitute the best evidence of injury sustained; yet in actions sounding altogether in damages, it seems that the measure of recovery must depend on circumstances. 1b
10. *Covenant and general indebitatus assumpsit*, for money paid by mistake, or a consideration wholly failed, are not to be confounded; in the latter, the consideration paid and interest is the measure of damages. 1b
11. An owner of land, through which a water course runs, is entitled to an action against a person for diverting the water from his land.—*Haymes vs. Grant*, 543
12. It is now a settled rule, that where a person has been evicted of land, or what amounts to the same thing, where he is deprived of it by a paramount title in another, although there has been no eviction, he is entitled to recover back the purchase money with interest, and nothing more. But there may be cases where the rents and profits in the mean time, will take away the claim of the party to interest.—*Bond vs. Quattlebaum*, 584
13. If a deduction is to be made for a particular piece of land, it must be according to the price at which it was estimated at the time of the sale.—And if the contract was for a gross sum, for all the land, without setting a specific value on each or any particular tract, then the deduction must be in proportion to its relative value and importance, when taken in connection with the whole. 1b
14. A conjectural loss which may or may not be sustained by reducing the profits of a mill cannot be taken into consideration, as it would be violating the rule, that the deduction should be made with reference to the value of the land at the time of the sale, (i. e. the purchase money.) 1b
15. Consequential damages it seems, have never been allowed to be set off in any case; there must be an actual failure of consideration or the defence cannot be supported. 1b
16. So far as the defendant can show that the object of his purchase has been actually defeated, he is entitled to a deduction, and no farther. 1b
- ### DETINUE.
1. In an action of detinue, the damages were laid in the declaration to be only \$100, and the verdict was for the article detained or its value \$100, and \$100 damages; held that it was not a cause for arrest of judgment, on the ground that the verdict exceeded the amount of damages laid in the declaration.—*Laborde vs. Humph*, 15
- ### DECLARATION.
- See Pleading.*
- ### DECREE.
- See Evidence.*
- ### DEED.
- See Bond. Evidence 29.*
1. Though a deed refer to a matter extrinsic, to explain which a resort to parol evidence may be necessary, that does not authorize parol evidence to be given to explain or contradict the deed itself.—*No. Car. So. vs. Johnson*, 47.
2. No man can make an averment against his own deed:

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- and where the defendant gives a bond to A. he cannot plead that the bond was given to A. for the benefit of a co-partnership, of which A. was a member.—*Stoney vs. McNeil*, 85
3. Under the act of 1731, upon proof of the loss of the original deed, a certified copy from the registers office, proved and recorded, is good evidence.—*Dingle vs. Bowman*, 177
4. Where personal property is conveyed by a husband to a trustee, for the benefit of his wife and children, the subsequent possession of the husband is consistent with the object of the deed, and is no evidence of fraud in behalf of a subsequent purchaser.—*Hudnal vs. Teasdale*, 228
5. Where an ambiguity in a deed has been raised by parol evidence, the same kind of evidence may be admitted to remove such ambiguity, but no further.—*Milling vs. Crankfield*, 258
6. Wherever a subsequent purchaser has received explicit notice of a former conveyance, such conveyance though not recorded will be valid, legal and effectual against the subsequent conveyance of such purchaser, though recorded in due time.—*Tart vs. Crawford*, 265
7. Where the subscribing witnesses to a deed were without the state, their signatures must be proved, before the deed can be admitted in evidence, although it should be proved that the signing of the deed was in the hand writing of the vendor.—*Cornwell vs. Bickley*, 466
8. The only cases in which a party can aver against the consideration expressed in his own deed are when it is *illegal or fraudulent*; and a person cannot allege that a bill of sale was not given by him at the time the contract was entered into, but three or four weeks

afterwards.—*Garrett vs. Stuart*, 511

9. A party cannot at law, by parol testimony, shew a different consideration from the one expressed in a deed; but it may be admitted, it seems, to show a greater or less of the same character, 15

DELIVERY.

See Contract.

1. After the defendant had agreed to purchase a quantity of cotton bagging from the plaintiff, he was told it remained in the plaintiff's store subject to his risk, whereupon he ordered and had some of it turned out of the store, which he afterwards returned, and then refused to take any part of it, the court *Held*, that it was a sufficient delivery under the 17th section of the Statute of Frauds.—*Jackson vs. Watts*, 288

DEMAND.

See Interest. Trover.

DEMURER.

See Pleading.

DESCENT.

See Intestates Estates.

DEVASTAVIT.

See Executor and Administrator.

DEVISE.

See Wills and Testaments.

DISCHARGE.

1. Where the defendant, who was a sea captain, bought goods, and was to have given his note with A. as security for the same, but went to sea without giving his note, and the agent of the vender received the note of A. alone, "which, when paid, was to be in satisfaction of the defendant's debt," the Court *Held*, that it was not a discharge of the defendant.—*Prescott vs. Hibbell*, 94
2. Where several witnesses swore that it was a custom when the vendor of goods re

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ceived a note of the consignee without the endorsement of the purchaser, that the purchaser became discharged, and the maker of the note only liable; the Court *Held*, that it was a custom so unreasonable, that it could never supercede the law to the contrary, *Ib* 95

3. One Co Administrator, as well as a Co-Executor, may discharge a debt due to his intestate.—*Gage vs. Admr. of Johnson*, 492

DISCOUNT.

1. Debts to be set-off must be in mutual rights; and an individual demand cannot be pleaded in discount of a demand due to a partnership, unless it can be shown that an agreement or understanding existed between the parties, that such a private demand should be received in discount.—*Love & Payne vs. I. B. Whitmore*, 491
2. A discount to an action on a note, *within the summary process jurisdiction*, which involves the titles to land, is inadmissible.—*Lindsay vs. Lindsay*, 491
5. It seems that where the defendant has a *bona fide* defence involving a title to land, that on application to the circuit court, an order requiring the plaintiff to declare, may be obtained, by which means he may avail himself of such defence, *Ib*

DISTRESS.

See Replevin.

DOWER.

1. No damages are allowed on a judgment in Dower.—*Heyward vs. Ecr. of Heyward*, 386

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24. In an action of slander, where the witnesses were doubtful whether the words spoken were, "you are a damned mulatto son of a bitch," or "you are a damned mulatto looking son of a bitch," and the words laid were, "you are a damned mulatto son of a bitch," the Court *Held*, that the words proved did not support the plaintiff's declaration; although at the time of uttering the words, the defendant, after the witnesses were called upon by the plaintiff to take notice of what he said, repeated, "I never eat my words; if you are not a mulatto, your looks belie you."—*Atkinson vs. Hartley*, 203
25. Whatever is alleged on one side, and not denied on the other, shall be taken as true.—*Admr. of Porter vs. Kenny*, 205
26. If a person agree to sell land for so much per acre, and afterwards execute titles for the same, by metes and bounds, be it more or less, and take a note for the purchase money, if it turn out afterwards that there is a greater number of acres than was contemplated, the seller shall not recover payment for the overplus. The verbal agreement is merged in the written contract, and parol evidence cannot be admitted to prove any contract different from the written agreement. *Falconer vs. Garrison*, 209
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- evidence shall not be permitted to explain or contradict a deed, *applies as well* to cases involving the titles of land as to others.—*Milling vs. Crankfield.* 258
28. Where an ambiguity in a deed has been raised by parol evidence, the same kind of evidence may be admitted to remove such ambiguity, but no further, *Id*
29. The testimony of one of the executors that he had made diligent search, and had been unable to find a deed, is sufficient evidence of its loss, without examining the other executor, to admit in evidence, a copy, dated 1778, certified by the deputy register, and sworn to be a true copy by a witness who had compared the copy with the record, it being also supported by the testimony of the subscribing witness that some land had been conveyed by the grantor to the grantee, about the date of the deed, and he believed this to be a copy of the deed.—*Turnipseed vs. Hawkins.* 272
30. An old survey, 32 years old, reciting that the survey had been made for the grantee, was admitted in evidence, and was the only act of ownership or possession proved, *Id*
31. The surveyor who made the ancient survey was dead, but the plat was admitted upon the testimony of a surveyor who was familiar with his works, and who swore to the similarity; though he did not know his hand-writing, *Id*
32. The subscribing witness swearing that he saw the testator sign, &c. and that he attested the will in his presence, "and that the other witnesses were also present, and subscribed their names in his presence and in presence of the testator," is sufficient evidence that the testator executed the will in the presence of all the witnesses, *Id*
33. The plaintiff claimed under a deed from executors, authorized to sell the land at public auction; the deed is sufficient without shewing that the sale had been publicly made; for the court will presume that the executors had done their duty, and had sold in pursuance of the will, *Id*
34. It seems to be very well settled, that an objection to the competency of a witness can be sustained only, 1st. Where he has a direct interest in the event of the cause. 2d. Where the judgment can be given in evidence for or against him in another cause. 3d. Where it has been settled by solemn decisions that from motives of policy or expediency, he ought not to be permitted to give evidence.—*State vs. Anthony.* 285
35. The same interest which will exclude the husband will exclude the wife; but it is laying down the proposition too broad to say that the wife can in no case be a witness where the husband is incompetent. A conviction of perjury or felony will render a husband incompetent, but not the wife. *Id*
36. The prisoner was indicted, together with his son, for murder. The father was charged with having given the mortal wound, and the son as having been present, aiding and assisting. They were tried separately; and on the trial, first, of the father, the court *Held*, that the wife of the son was a competent witness; for both being charged as principals, one may be tried and convicted, and the other acquitted, *Id*
37. In an action upon a replevin bond, the same proof is not required as in the action of replevin, to wit; that the defendant was the tenant of the plaintiff, at a particular rent, &c.; for the judgment in replevin is conclusive in this.—*City Council vs. Price.* 290
38. The return of the sheriff is good, although it does not ap-

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of his endorsement, when he paid off the note as soon as it became due.—*Richardson vs. Presnall*, 192

5. Where the plaintiff's demand has been reduced by actual payments, to a sum within the *Summary Process*, jurisdiction, he must proceed by way of *Summary Process* for the balance; and if he bring his action for the whole, he can recover only the costs of a *Summary Process*. But it is otherwise where there are mutual demands, and the plaintiff's debt is reduced by discount; because he may not know the amount of the defendant's demand; neither can he know that he will avail himself of such defence.—*Levy vs. Roberts*, 395

6. Upon a rule against the sheriff to shew cause why certain money collected for fines inflicted in the court of sessions should not be paid over, the Court *Held* that the sheriff was not entitled to retain 5 per cent. for his commissions upon the amount collected; and that the clause of the county court act under which he made such claim was repealed by the Judiciary act of 1798, and that the act of 1791, regulating the fee bill, repealed all former acts allowing costs, and allowed none in this case.—*State vs. Sheriff of Charleston*, 419

7. In action on the case in the nature of an action for ravishment of ward to try the freedom of a negro, where the jury found a verdict establishing the right of the plaintiff's ward to freedom, but found no damages, the Court *Held* that the plaintiff was entitled to costs.—*Clifton vs. Phillips*, 469

8. Wherever it is intended by a defendant to require security for costs, where the plaintiff resides out of the state, reasonable notice should be given to the plaintiff or his attorney, of such intention, prior to the

court at which the cause is to be tried, that no plaintiff may be taken by surprise.—*Dismukes vs. Dismukes*, 552

Security for cost does not depend upon the defendants putting in bail. 16

COVENANT.

1. Upon a covenant for the lease of a lot, whereon lessee covenanted to build, which buildings, at the expiration of the lease were to be valued by indifferent persons, and at which valuation the lessor was to take the buildings, he paying for the same in one, two, and three years from the expiration of the time; the Court *Held*, that the payment for, was not a covenant precedent to the delivery of, the houses.—*Manigault vs. Carroll*, 91

2. A purchaser of land may maintain an action of covenant on the warranty, (against all persons lawfully claiming or to claim,) before eviction, by showing a paramount title in a third person; but where the plaintiff claimed a tract of land and thinking that the defendant's title was better than his, and, to obtain this outstanding title, purchased this tract, with two others adjoining, and took a deed in the form prescribed by the act of 1795, (containing a warranty as above,) and afterwards discovered that his first title was better than the second, and commenced his action against the defendant, for a breach of the warranty, not being disturbed by the claim of any third person, the Court non-suited the plaintiff; because it could not be intended that the vendor would give a warranty against the title of the vendee himself, when it was bought for the purpose of protecting that title.—*Biggs vs. Braddy*, 556

3. In covenant on a deed for breach of warranty of sound-

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ness of a negro slave, the measure of recovery is to the extent of the injury which the party sustains by the infraction of the covenant, whether it be partial or total, and must necessarily depend on the circumstances of the case.—*Garrett vs. Stuart*, 514

4. In *special assumpsit*, for breach of warranty, it seems, that the consideration paid, is not necessarily the measure of damages, but, under particular circumstances, a jury may give more; although in most cases it would constitute the best evidence of injury sustained; yet in actions sounding altogether in damages, it seems that the measure of recovery must depend on circumstances, 1b

5. *Covenant and general indelbitatus assumpsit* for money paid by mistake, or a consideration wholly failed, are not to be confounded; in the latter, the consideration paid and interest, is the measure of damages, 1b

CRIM. CON.

1. Case as well as trespass *vi et armis* is a proper action for criminal conversation.—*Haney vs. Townsend*, 206

CUSTOM.

See *Bills of Exchange and Promissory Notes*, 2

DAMAGES.

See *Warranty and Interest*.

1. In an action of detinue, the damages were laid in the declaration to be only one hundred dollars, and the verdict was for the article detained or its value \$100, and \$100 damages; *Held* that it was not a cause for arrest of judgment, on the ground that the verdict exceeded the amount of damages laid in the declaration.—*Laborde vs. Rumbh*, 15

2. In an action of debt upon a judgment, which judgment had been for damages to the

amount of the penalty of the bond upon which the action had been brought, the court *Held*, that the plaintiff in his action upon the judgment could recover interest by way of damages beyond the penalty of the bond, upon which the judgment was founded.—*Smith vs. Vanderhorst*, 328

3. On a breach of warranty expressed or implied, in the sale of an article, the damages to be recovered must be rateable with the loss; and if a total loss, the whole sum paid, with interest, may be recovered back.—*Egleston vs. Macauley, Executor*, 379

4. Where the verdict is for damages beyond the amount laid in the writ, the plaintiff must enter a *remittitur* for the surplus or a *penire de novo* will be awarded.—*Givens, et. ux. vs. Porteous*, 379

5. No damages are allowed on a judgment in Dower.—*Heyward vs. Heyward, Exr.* 386

6. In cases of eviction the price of the land and interest from the time of the purchase shall be the measure of damages; but where the loss is only partial, the party evicted may shew that the part of the land lost is more valuable than the rest, and claim a compensation adequate to the loss; i. e. the relative value and not the average price is the measure of damages.—*Admr. Wallace vs. Talbot*, 466

7. And in action upon such note, given for a tract of land, where a discount was set up, that the wife's dower had not been released, the Court *Held*, that the defendant could be allowed nothing, for the dower; for as the husband is now living, it is only possible that the right of dower may accrue, and a possible injury is not a subject for damages.—*Mussey vs. Craine*, 489

8. In covenant on a deed for breach of warranty of soundness of a negro slave, the mea-

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53. It is very much to be doubted whether a person ought ever to be convicted of a felony on the uncorroborated testimony of a prosecutor who claims the property in question, where the defendant sets up a title in himself; and where the transaction was attended with none of the usual concomitants of larceny, as concealment, &c. the court, upon conviction, will grant a new trial.—*State vs. Kane*, 482
60. A judgment between A. and B. in a Court of Equity on a bill by A. against B. to make titles, will be conclusive in an action at law between A. and C. as to the execution of a power of attorney from D. the original owner, to B. to sell.—*Hoagler vs. Huffman*, 495
61. Where the plaintiff had bought a tract of land at Sheriff's sale, but no title was executed by the Sheriff, and afterwards, filed his bill in Chancery against the successor of the Sheriff, to have a title executed, which, in pursuance of the decree of that court, was executed to the plaintiff, the Court *Held* that such title was admissible in an action to try titles between the plaintiff and a third person, and that they would not look into the proceedings of the court of equity to ascertain in what manner they acted, it was enough that they had power to act and had acted, and their decree was as binding as a judgment of this court.—*Hall vs. Carruth*, 507
62. A party cannot at law, by parol testimony, shew a different consideration from the one expressed in a deed; but it may be admitted, *it seems*, to show a greater or less of the same character.—*Gurrett vs. Stuart*, 514
63. A miller's books, who swore to the original entries, which he made, are admissible to prove the quantity of lumber furnished from his saw mill to the defendant.—*Gordon vs. Arnold*, 517
64. The act of 1803, to authorize office copies of grants to be given in evidence, includes as well office copies, certified by the *deputies* of the secretary of state and of the surveyor general, as by those officers themselves.—*Maxwell vs. Carile*, 534
65. In an action of *special assumpsit*, to recover back the price paid for any property, which proves unsound, there is no necessity to prove a return of the property or any rescision of the contract; if general *indebitatus assumpsit* be the action, it is then necessary.—*Banks vs. Hughes*, 537
66. The acknowledgments of one of several makers of a joint and several promissory note, that the debt is still due, is sufficient to take the case out of the statute, as to the others; and such an acknowledgment may be given in evidence, in a separate suit against any of the others, and will be conclusive, unless counteracted by opposing testimony.—*Beitz, Adm'r vs. Fuller*, 541
67. Where two gave their joint and several note, upon which one was sued, the other cannot be a witness for the defendant.—*Kile vs. Graham*, 552
68. Where the plaintiff's declaration contains three counts, (1) as *endorsee*, (2) for goods sold and delivered, and (3) *quantum valebant*, he is not confined in his evidence to any particular one.—*Mathieu vs. Nixon*, 571
69. On an indictment for retailing spirituous liquors, without a license, the State need not prove that the defendant had not a license, as the defendant must prove he had one.—*State vs. Geuing*, 575

EXECUTION.

1. A Fi. Fa. and Ca. Sa. can both

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- and where the defendant gives a bond to A. he cannot plead that the bond was given to A. for the benefit of a co-partnership, of which A. was a member.—*Stoney vs. McNeils*, 85
3. Under the act of 1731, upon proof of the loss of the original deed, a certified copy from the registers office, proved and recorded, is good evidence.—*Dingle vs. Bowman*, 177
4. Where personal property is conveyed by a husband to a trustee, for the benefit of his wife and children, the subsequent possession of the husband is consistent with the object of the deed, and is no evidence of fraud in behalf of a subsequent purchaser.—*Hudnal vs. Teasdale*, 228
5. Where an ambiguity in a deed has been raised by parol evidence, the same kind of evidence may be admitted to remove such ambiguity, but no further.—*Milling vs. Crankfield*, 258
6. Wherever a subsequent purchaser has received explicit notice of a former conveyance, such conveyance though not recorded will be valid, legal and effectual against the subsequent conveyance of such purchaser, though recorded in due time.—*Tart vs. Crawford*, 265
7. Where the subscribing witnesses to a deed were without the state, their signatures must be proved, before the deed can be admitted in evidence, although it should be proved that the signing of the deed was in the hand writing of the vendor.—*Cornwell vs. Bickley*, 466
8. The only cases in which a party can aver against the consideration expressed in his own deed are when it is *illegal or fraudulent*; and a person cannot allege that a bill of sale was not given by him at the time the contract was entered into, but three or four weeks

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DELIVERY.

See Contract.

1. After the defendant had agreed to purchase a quantity of cotton bagging from the plaintiff, he was told it remained in the plaintiff's store subject to his risk, whereupon he ordered and had some of it turned out of the store, which he afterwards returned, and then refused to take any part of it, the court *Held*, that it was a sufficient delivery under the 17th section of the Statute of Frauds.—*Jackson vs. Watts*, 288

DEMAND.

See Interest. Trover.

DEMURER.

See Pleading.

DESCENT.

See Intestates Estates.

DEVASTAVIT.

See Executor and Administrator.

DEVISE.

See Wills and Testaments.

DISCHARGE.

1. Where the defendant, who was a sea captain, bought goods, and was to have given his note with A. as security for the same, but went to sea without giving his note, and the agent of the vendor received the note of A. alone, "which, when paid, was to be in satisfaction of the defendant's debt," the Court *Held*, that it was not a discharge of the defendant.—*Prescott vs. Hibbell*, 94
2. Where several witnesses swore that it was a custom when the vendor of goods re-

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ceived a note of the consignee without the endorsement of the purchaser, that the purchaser became discharged, and the maker of the note only liable; the Court *Held*, that it was a custom so unreasonable, that it could never supercede the law to the contrary, *Id* 95

3. One Co Administrator, as well as a Co-Executor, may discharge a debt due to his intestate.—*Gage vs. Admr. of Johnson*, 492

DISCOUNT.

1. Debts to be set-off must be in mutual rights; and an individual demand cannot be pleaded in discount of a demand due to a partnership, unless it can be shown that an agreement or understanding existed between the parties, that such a private demand should be received in discount.—*Love & Payne vs. I. B. Whitridge*, 2
2. A discount to an action on a note, *within the summary process jurisdiction*, which involves the titles to land, is inadmissible.—*Lindsay vs. Lindsay*, 491
3. It seems that where the defendant has a *bona fide* defence involving a title to land, that on application to the circuit court, an order requiring the plaintiff to declare, may be obtained, by which means he may avail himself of such defence, *Id*

DISTRESS.

See Replevin.

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22. Under the act of 1731, upon proof of the loss of the original deed, a certified copy from the registers office, proved and, recorded, is good evidence.—*Dingle vs. Bowman*, 177
23. The records of admission to naturalization, not mentioning that the person had three years previously declared his intention of becoming a citizen, is not sufficient; because the court will presume that the court which admitted the alien, must have received evidence of that fact at the time, and admitted the party as the law directs.—*Richards vs. McDaniels*, 187
24. In an action of slander, where the witnesses were doubtful whether the words spoken were, "you are a damned mulatto son of a bitch," or "you are a damned mulatto looking son of a bitch," and the words laid were, "you are a damned mulatto son of a bitch," the Court *Held*, that the words proved did not support the plaintiff's declaration; although at the time of uttering the words, the defendant, after the witnesses were called upon by the plaintiff to take notice of what he said, repeated, "I never eat my words; if you are not a mulatto, your looks belie you."—*Atkinson vs. Hartley*, 208
25. Whatever is alleged on one side, and not denied on the other, shall be taken as true.—*Admr. of Porter vs. Kenay*, 205
26. If a person agree to sell land for so much per acre, and afterwards execute titles for the same, by metes and bounds, be it more or less, and take a note for the purchase money, if it turn out afterwards that there is a greater number of acres than was contemplated, the seller shall not recover payment for the overplus. The verbal agreement is merged in the written contract, and parol evidence cannot be admitted to prove any contract different from the written agreement.—*Falconer vs. Garrison*, 209
27. The rule of law that parol

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- evidence shall not be permitted to explain or contradict a deed, *applies as well* to cases involving the titles of land as to others.—*Milling vs. Crankfield*, 253
28. Where an ambiguity in a deed has been raised by parol evidence, the same kind of evidence may be admitted to remove such ambiguity, but no further, *Id*
29. The testimony of one of the executors that he had made diligent search, and had been unable to find a deed, is sufficient evidence of its loss, without examining the other executor, to admit in evidence, a copy, dated 1778, certified by the *deputy* register, and sworn to be a true copy by a witness who had compared the copy with the record, it being also supported by the testimony of the subscribing witness that some land had been conveyed by the grantor to the grantee, about the date of the deed, and he believed this to be a copy of the deed.—*Turnipseed vs. Hawkins*, 272
30. An old survey, 32 years old, reciting that the survey had been made for the grantee, was admitted in evidence, and was the only act of ownership or possession proved, *Id*
31. The surveyor who made the ancient survey was dead, but the plat was admitted upon the testimony of a surveyor who was familiar with his works, and who swore to the similarity; though he did not know his hand-writing, *Id*
32. The subscribing witness swearing that he saw the testator sign, &c. and that he attested the will in his presence, "and that the other witnesses were also present, and subscribed their names in his presence and in presence of the testator," is sufficient evidence that the testator executed the will in the presence of all the witnesses. *Id*
33. The plaintiff claimed under a deed from executors, authorized to sell the land at public auction; the deed is sufficient without shewing that the sale had been publicly made; for the court will presume that the executors had done their duty, and had sold in pursuance of the will. *B*
34. It seems to be very well settled, that an objection to the competency of a witness can be sustained only, 1st. Where he has a direct interest in the event of the cause. 2d. Where the judgment can be given in evidence for or against him in another cause. 3d. Where it has been settled by solemn decisions that from motives of policy or expediency, he ought not to be permitted to give evidence.—*State vs. Anthony*, 285
35. The same interest which will exclude the husband will exclude the wife; but it is laying down the proposition too broad to say that the wife can in no case be a witness where the husband is incompetent. A conviction of perjury or felony will render a husband incompetent, but not the wife. *Id*
36. The prisoner was indicted, together with his son, for murder. The father was charged with having given the mortal wound, and the son as having been present, aiding and assisting. They were tried separately; and on the trial, first, of the father, the court *Held*, that the wife of the son was a competent witness; for both being charged as principals, one may be tried and convicted, and the other acquitted, *Id*
37. In an action upon a replevin bond, the same proof is not required as in the action of replevin, to wit; that the defendant was the tenant of the plaintiff, at a particular rent, &c.; for the judgment in replevin is conclusive in this.—*City Council vs. Price*, 290
38. The return of the sheriff is good, although it does not ap-

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- pear to have been sworn to :
equally so where it has been
sworn to by the deputy sheriff,
but not signed by the sheriff. *Ib*
39. That the goods distrained
and replevied had not been reg-
ularly appraised according to
the act of the legislature, is an
objection which ought to have
been made in the action of re-
plevin, and cannot be taken in
an action on the replevin bond.
The former judgment con-
cludes the party, *Ib*
40. Upon the trial of an issue
between the garnishee and at-
taching creditors of the absent
debtor, as to the right to cer-
tain property attached, the
wife of the absent debtor can-
not be admitted to give evi-
dence.—*Forretier vs. Att. Cred. of Guerrineau*, 304
41. The Court also *Held*, that
on the trial of the issue, in
which the garnishee stood as
plaintiff, and the creditors as
defendants, that an order could
not be granted to strike one
of several such attaching cred-
itors off the record in order to
make him a witness for the oth-
ers; although he assigned
over the judgment which he
had recovered against the ab-
sent debtor to a third person,
who gave him a release, *Ib*
42. Where the agent of the
plaintiff called on the defend-
ant for payment of an account,
within the four years, who ad-
mitted that he had bought the
goods charged, but stated at
the same time, that he had
paid for them by an order of a
third person, and said that he
would produce the receipt;
and the *impression on the mind*
of the witness was, that the de-
fendant intended to pay the a-
mount if he could not produce
the receipt, which he never
did; the Constitutional court
refused to set aside a decree of
the Circuit court in favor of the
plaintiff, as the acknowledg-
ment was sufficient to prevent
the effects of the statute.—*Da-
vis vs. Verdier*, 320
43. A person cannot, by his
own oath, exculpate himself
from the penalty, under the
city ordinance of Charleston,
against riding or driving faster
than a walk in turning the cor-
ner of a street,—*City Council
vs. Dunn*, 333
44. A transaction between two
parties in a judicial proceeding
is not binding upon a third;
therefore in an action for wa-
ges as mariner and master of
the defendant's sloop, a decree
of the admiralty between A.
and the plaintiff is inadmissi-
ble.—*McEachern vs. Coch-
ran*, 338
45. Under an ordinance of the
city of Charleston, it is pro-
vided, "that the owner or ten-
ant of any house, whose chim-
ney shall take fire, and blaze
out at the top shall be subject
to a fine of not less than fifty,
nor more than one hundred
dollars." It appeared that the
chimney in this case, blazed
out in consequence of a ne-
gro servant carelessly throw-
ing into the fire a band box
filled with pieces of silk,
crape, clip and shreds of
work, and that the blaze
was but momentary; the
court *Held*, that the owner or
tenant was still liable to the
penalty.—*Council vs. Palmer*, 342
46. Where the plaintiff sued
the defendant in debt, on
judgment obtained against
him as administrator, suggest-
ing a *devastavit*, the original
judgment to which the defend-
ant had not pleaded *plene ad-
ministravit*, and the execution
issued on that judgment and
returned *nulla bona*, also, the
defendant's account as admi-
nistrator, filed with the ordi-
nary and sworn to, admitting
a large balance in his hands
due to the estate, exceeding
the amount of the judgment,
is quite sufficient evidence of
a *devastavit*.—*Givens vs.
Porteus*, 379
47. Indeed it has often been
held, that "a former judg-

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- ment against executors, and a *fi. fa.* returned *nulla bona*, are conclusive evidence of a *deceit*, *Id.* in note
48. A writ (of *certiorari*,) which has been allowed, must be considered as legally allowed, until reversed.—*State vs. Clarke*, 382
49. In an action by the executrix of a deceased physician, against the captain of a ship, for medicine and attendance on the mate of the ship, the physician's book of original entries proved in the usual way, and the testimony of a witness who said he presented the bill to the captain, who made no objections to it, but who could not say positively that he said he would pay it, but the impression on his mind was, that he intended to pay, was *Held* by the court sufficient evidence to make the captain liable; and that it was not a case within the Statute of Frauds.—*Ex. McBride vs. Vatte*, 314
- On a plea of *non est factum* a bond, under the act of 302, any competent witness may prove the hand-writing of the obligor in the place of the subscribing witness, unless a plea of the defendant be verified by his oath.—*Ex'rs Amigault vs. Deas*, 391
- No proceedings are necessary to be had against the garnishee, who makes no return to the attachment, until judgment is recovered against the debt debtor; and then upon motion, *it seems*, even without leave, judgment may be entered up against the garnishee; therefore, a garnishee who has made no return, and in whom no proceedings have been had for four years, during which time the judgment had not yet been reversed against the absent or, cannot be examined as a witness on the part of the absent debtor, on the trial of the case in which he had been garnisheed.—*Richardson vs. Whitfield*, 403.
52. An express warranty of title does not exclude an implied warranty of soundness.—*Wells vs. Spears*, 421
53. A free negro is an incompetent witness in any case where the rights of white persons are concerned.—*White vs. Helmes*, 439
54. Although the whole confession must be received and not garbled, yet the jury are not bound to give implicit faith to the whole or any part. Confessions are received just as other evidence, to be considered and weighed, and thereupon to be credited according to the character, interest and appearances, &c. of the party confessing.—*Smith, Ex'r vs. Hunt*, 440
55. The plaintiff in trespass to try titles cannot maintain his action unless he prove an actual trespass.—*Cornell vs. Bickley*, 466
56. Where the subscribing witnesses to a deed were without the state, their signatures must be proved, before the deed can be admitted in evidence, although it should be proved that the signing of the deed was in the hand writing of the vendor, *Id.*
57. To an action upon a note, to which *non assumpsit* was pleaded, the defendant may prove that it was given for a tract of land, the lines and boundaries of which were fraudulently misrepresented by the vendor.—*Shelton vs. Ex'rs Gurry*, 476
58. Where the plaintiff was a shop keeper, and sued the defendant on an open account, most of the items of which were for *spirituous liquors*, he may nevertheless recover his account, and his books are admissible to prove it. Nor is he bound to prove that he had a license to retail spirituous liquors.—*Mclock vs. Riser*, 481

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59. It is very much to be doubted whether a person ought ever to be convicted of a felony on the uncorroborated testimony of a prosecutor who claims the property in question, where the defendant sets up a title in himself; and where the transaction was attended with none of the usual concomitants of larceny, as concealment, &c. the court, upon conviction, will grant a new trial.—*State vs. Kane*, 482
60. A judgment between A. and B. in a Court of Equity on a bill by A. against B. to make titles, will be conclusive in an action at law between A. and C. as to the execution of a power of attorney from D. the original owner, to B. to sell.—*Keagler vs. Huffman*, 495
61. Where the plaintiff had bought a tract of land at Sheriff's sale, but no title was executed by the Sheriff, and afterwards, filed his bill in Chancery against the successor of the Sheriff, to have a title executed, which, in pursuance of the decree of that court, was executed to the plaintiff, the Court *Held* that such title was admissible in an action to try titles between the plaintiff and a third person, and that they would not look into the proceedings of the court of equity to ascertain in what manner they acted, it was enough that they had power to act and had acted, and their decree was as binding as a judgment of this court.—*Hall vs. Carruth*, 507
62. A party cannot at law, by parol testimony, shew a different consideration from the one expressed in a deed; but it may be admitted, *it seems*, to show a greater or less of the same character.—*Gurrett vs. Stuart*, 514
63. A miller's books, who swore to the original entries, which he made, are admissible to prove the quantity of lumber furnished from his saw mill to the defendant.—*Gordon vs. Arnold*, 517
64. The act of 1803, to authorize office copies of grants to be given in evidence, includes as well office copies, certified by the *deputies* of the secretary of state and of the surveyor general, as by those officers themselves.—*Marwell v. Carlike*, 534
65. In an action of *special assumpsit*, to recover back the price paid for any property, which proves unsound, there is no necessity to prove a return of the property or any rescission of the contract; if general *indebitatus assumpsit* be the action, it is then necessary.—*Banks vs. Hughes*, 537
66. The acknowledgments of one of several makers of a joint and several promissory note, that the debt is still due, is sufficient to take the case out of the statute, as to the others; and such an acknowledgment may be given in evidence, in a separate suit against any of the others, and will be conclusive, unless counteracted by opposing testimony.—*Beitz, Adm'r vs. Paller*, 541
67. Where two gave their joint and several note, upon which one was sued, the other cannot be a witness for the defendant.—*Kile vs. Graham*, 552
68. Where the plaintiff's declaration contains three counts, (1) as *endorsee*, (2) for goods sold and delivered, and (3) *quantum valebant*, he is not confined in his evidence to any particular one.—*Mathieu vs. Nixon*, 571
69. On an indictment for retailing spirituous liquors, without a license, the State need not prove that the defendant had not a license, as the defendant must prove he had one.—*State vs. Gening*, 577

EXECUTION.

1. A Fi. Fa. and Ca. Sa. can both

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ing judge; but none, where the objections were to the merits of the verdict, and not to the manner or time of trial, *Id*

JUDGMENTS.

See Lien.

1. A transaction between two parties in a judicial proceeding is not binding upon a third; therefore in an action for wages as mariner and master of the defendant's sloop, a decree of the admiralty between A. and the plaintiff is inadmissible.—*McEachern vs. Cochran*, 338

JURISDICTION.

1. It is sufficient to shew that the parties all lived in the city of Charleston, and that the proceedings were carried on there, to give jurisdiction to the City Court, without proving that the waste was committed there.—*Thomas vs. Dyott Admr.* 76
2. *Quere.*—If a Corporation of another State can maintain an action in this state, in its corporate name?—*Braden, Green & Co. vs. Minis*, 80
2. The summary process jurisdiction of this Court is not concurrent with the jurisdiction of the Court of Equity. It only furnishes a different method of trying cases within the jurisdiction of the Court before such proceedings were established.—*Taylor vs. Drake* 174
3. A citizen and resident of Rhode-Island may sue a citizen of South-Carolina, resident of Charleston, in the city court of Charleston.—*Green vs. Smith*, 324
4. Indeed it seems that any person competent to sue, may institute an action in the city court against any inhabitant who resides within the city, to the extent of (\$500) the jurisdiction conferred, *Id*
5. It seems also that where the defendant resided in Charleston, and ordered goods to be sent to her, that the contract

will be considered as arising in Charleston. *Id*

6. The jurisdiction of Charleston extends to the northernmost line of Boundary-street.—*Horton vs. City Council*, 345
7. The act of 1754, giving powers to the commissioners of the streets in Charleston to make drains and assessments to pay for the same, has been repealed by the acts of 1783 and 1785; and the city ordinance of 1806, is now in force, and the only rule of action for the City Council in making drain assessments. And the court granted a prohibition to restrain the council from levying a fine assessed in a different manner from that provided by that ordinance. *Id*
- 8 A magistrates jurisdiction extends in cases of domestic attachments to \$20, and is not confined to \$1.—*Roberts vs. Brown*, 438

JURY.

See Necessaries.

1. The jury cannot be polled, but at the discretion of the Court.—*Martin vs. Maverick*, 34
2. The jury only can determine what are the necessities for a ship.—*Burquin & Co. vs. Finn*, 316
3. Peril of the sea or not, is a question for the jury.—*Marsh & Hawren ads Ear's Bluths*, 360
4. Whether any and what kind of notice will dispense with the necessity of recording a deed, are questions for the court; but whether the party had or had not such notice, is a question for the jury.—*Turt vs. Crawford*, 479
5. Ordinary care, is a question for the jury.—*Aron vs. Newson*, 509
6. The right of polling the jury is not attached to either the plaintiff or defendant, (in state as well as civil cases.) It is a mean to which the court sometimes resort, to ascertain if the jury are agreed on their verdict; but when the court

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a deed from executors, authorized to sell the land at public auction; the deed is sufficient without shewing that the sale had been publicly made; for the court will presume that the executors had done their duty, and had sold in pursuance of the will.—*Turnpseed vs. Hawkins*, 272

6. Where the plaintiff sued the defendant in debt, on judgment obtained against him as administrator, suggesting a *devastavit*, the original judgment to which the defendant had not pleaded *plene administravit*, and the execution issued on that judgment and returned *nulla bona*, also, the defendant's account as administrator, filed with the ordinary and sworn to, admitting a large balance in his hands due to the estate, exceeding the amount of the judgment, is quite sufficient evidence of a *devastavit*.—*Givens vs. Porteus*, 379

7. Indeed it has often been held, that "a former judgment against executors, and *a. f. i.* returned *nulla bona*, are conclusive evidence of a *devastavit*." *Ib in note*

8. This court has always refused to act upon any agreement between council, about which they differ and which is not in writing.—*Gage vs. Admr. of Johnson*, 492

FACTOR AND AGENT.

1. A Factor cannot pledge the goods of his principal for his own debt. But it is equally clear, that when a Consignee acts within the scope of his authority, and employs a sub-agent to carry that authority into execution, as by selling goods consigned to him, or doing any other act within that authority, that such sub-agent has a lien on the goods upon which he has made advances for the purposes of a sale.—*Bowie & Sons vs. Napier & Co*, 1

2. A wharfinger, who has not

been directed to store, is not liable for the loss of rice upon his wharf, after it has been weighed; for the wharfage paid is not a consideration for the safe keeping of the rice.—*Pernal vs. Crawford*, 334

FEME COVERT.

1. The will of a feme covert giving her property to her husband is void, though made with his consent.—*Hood vs. Archer*, 225

1. A feme covert, living alone from her husband and not under his power, is liable to an indictment for retailing spirituous liquors without a license.—*State vs. Collins*, 356

3. A feme covert, cannot by her last will and testament, made with her husband's consent, bequeath her choses in action to him.—*Hood vs. Archer*, 47^r

FERRY AND FERRYMAN.

1. A ferryman is liable as a common carrier.—*Miles vs. Johnson*, 15^r

2. It is the duty, as it seems, of every ferryman to have his flat so constructed that it may be easy for carriages of all descriptions, and drivers of all capacities to enter them, *Ib*

3. By the act of assembly of 1809, it is made the duty of every person keeping a ferry to keep the banks in repair, *Ib*

3. The mode and manner in which a carriage is to be received into a flat, must be regulated by the ferryman, and if a person requests assistance and directions, and the ferryman refuses, but tells him to proceed, and he thereupon proceeds to enter the flat, and in making the attempt, his property is injured or lost, the ferryman is liable; for when the traveller is directed to proceed, all matters of discretion, which the law gives to the ferryman, will be thereby transferred to the passenger, and the possession of the property

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will be considered as being in the ferryman,

3. A ferry-man is liable as a common carrier; and as soon as a carriage is fairly on the slip or drop of a flat, though driven by the servant of the owner of the carriage, it is in the ferryman's possession; and he will be liable for any damage which may afterwards occur to it or the horses. The carriage and horses, injured, of a person so passing a ferry, are not mere appendages of the person.—*Cohen vs. Hume*; 439

FEES.

1. In suits requiring great professional labor, where much time must necessarily be consumed, and diligence and skill required, in the preparation and management of them, an attorney may rightfully and legally charge, by way of counsel fee, a sum proportioned to the value of the services; and which a jury of the country, upon evidence before them, are competent to ascertain and decide upon.—*Duncan vs. Ex'rs. of Yunces*, 149

2. Where an Attorney brought an action against a client for costs and counsel fees, for a case which he had managed in a Court of Equity, the answer of the defendant, in the hand writing of the attorney, and signed by him as attorney, and sworn to by the defendant, furnishes the highest evidence that can be required, that the service was performed at defendant's request.—*Harper vs. Williamson*, 156

3. And although there were two other defendants, yet by reference to the answer, it appeared that their names were added *pro forma*, and that the defendant was the only one of them really interested in the case, and both of the others swore that they had not employed the counsel,

A gambler may maintain a spe-

cial action on the case for his fees.—*Love vs. Lowry*, 181

FRAUDS, AND STATUTE OF.

1. If the person for whose use goods are furnished be liable at all, any promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds.—

Leland vs. Creyon, 100

2. Where the defendant being present with L. in a store, verbally promised to be responsible to the merchant for what goods he might let L. have, and the merchant let L. have goods, and charged them to L. in his books, and afterwards was paid part by L., the promise is void under the statute of frauds; although the merchant made the following memorandum in his book, viz. "The above articles were delivered to L., who was introduced by J. M. C. who agreed to be responsible for what Mr. L. may want in merchandise. Credit was given on said C. becoming responsible." 16

Quere? If such memorandum is competent testimony.—*Id* 106 note b.

3: A deed is not void against a subsequent purchaser, merely because it is voluntary, even though the person making it should owe some inconsiderable debts at the same time.—*Hudnal vs. Teasdale*, 227

4. Where personal property is conveyed by a husband to a trustee, for the benefit of his wife and children, the subsequent possession of the husband is consistent with the object of the deed, and is no evidence of fraud in behalf of a subsequent purchaser.—*Hudnal vs. Teasdale*, 228

5. After the defendant had agreed to purchase a quantity of cotton bagging from the plaintiff, he was told it remained in the plaintiff's store subject to his risk, whereupon he ordered and had some of it turned out of the store, which he

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- afterwards returned, and then refused to take any part of it; the court *Held*, that it was a sufficient *delivery* under the 17th section of the Statute of Frauds.—*Jackson vs. Watts*, 288
6. In an action by the executrix of a deceased physician, against the captain of a ship, for medicine and attendance on the mate of the ship, the physician's book of original entries proved in the usual way, and the testimony of a witness who said he presented the bill to the captain, who made no objections to it, but who could not say positively that he said he would pay it, but the impression on his mind was, that he intended to pay, was *Held* by the court sufficient evidence to make the captain liable; and that it was not a case within Statute of Frauds.—*Ex'rs Mc Bride vs. Watts*, 384
7. Where no action will lie against the person undertaken for, it is an original undertaking, and not within the Statute of Frauds.—*Mease vs. Wagner*, 395
8. On a sale of lands, the following receipt was held sufficient to take the case out of the Statute of Frauds, viz. "Received of C. \$20, being on account of a plantation on the *Cypress*, sold to him this day for two thousand two hundred dollars, payable in different instalments, as per agreement." (Signed) D & C.—*Cosack vs. Descoudres & Crovat*, 425
9. Where the defendant had received goods for the purpose of paying the debts of A. and promised B. who had a note of A. and who was about to attach property in the hands of the defendant, that if he would wait until fall he would pay the note; the Court *Held* the promise good, and not within the Statute of Frauds.—*Madden vs. McCray*, 486
10. The promise being made to the agent of B. is the same as if made to B. himself, 48
11. Where the defendant purchased a tract of land of the plaintiff, to whom the plaintiff gave a conveyance in the form prescribed by the act of 1795. (with a warranty against all lawfully claiming, &c.) and afterwards, when he called upon the defendant for his note for the purchase money, promised the defendant that his wife should renounce her dower, which was an objection made by the defendant to his giving his note, the Court *Held*, that this promise, made after the conveyance, was without consideration, and against the policy of the law.—*Mussey vs. Craine*, 489
12. Promises made on a consideration that is wholly past, without any new consideration moving to it, are void; but it seems, circumstances growing out of, and connected with the original contract, and an infinite variety of others, may constitute a new legal consideration.—*Garrett vs. Stuart*, 514
13. Where the plaintiff attached a horse, the property of his absent debtor, in the possession of the defendant, who promised that if the plaintiff would release the horse, he would pay the debt, the Court *Held* the promise good; as neither being within the statute of frauds, nor a *nudum pactum*.—*Adkinson vs. Barfield*, 575

FUNERAL.

1. Where the wife whose husband died and left his estate to her for life, remainder to his nephew, died leaving a *separate estate of her own*, the court *Held* that the estate of her husband was not liable for her funeral expenses; but that *her own estate* was bound for them. *Mease vs. Wagner*, 398

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GAOL AND GAOLER.

See Insolvent Debtor.

1. A gaoler may maintain a special action on the case for his fees.—*Love vs. Lowry*, 181

GARNISHEE.

See Attachment.

GENERAL ISSUE.

See Pleading.

GIFT.

1. Lending a negro to a son-in-law, and permitting it to go home with the daughter when she goes to house-keeping, will not be construed into a gift when it has not been accepted and kept by him.—*Ex'rs. of Webb vs. Duncan*, 213
2. Where the jury found a verdict, in support of a parol gift made in these words, the court supported it, viz: "I beg you to recollect I have given that horse to my son."—*Fowler vs. Stuart*, 504
3. If the intention of the donor be doubtful, it seems, the delivery ought to be fully proved. If the intention to give be evident, slighter proof of delivery may be sufficient. If however any proof of the intention and delivery be afforded, it becomes a question of fact on which the jury must decide, and their decision will be supported, unless very much against the weight of evidence, *Id*

GOVERNOR.

See Pardon.

HABEAS CORPUS.

1. Where the defendant was indicted for horse stealing, and at the first court there was a *mistrial*, in consequence of the jury finding him guilty of petit larceny, and at the second court, was not tried in consequence of the state not being ready, the Court *Held* that though he demanded his trial, yet he was not entitled to be discharged according to the

provisions of the *habeas corpus* act.—*State vs. Spurgen*, 563

HIGHWAY.

See Rivers.

1. A thoroughfare, or way, leading from one highway to another, is a highway, the stopping of which is a nuisance, for which an indictment will lie.—*State vs. Duncan*, 404

HORSE STEALING.

1. Where a person was indicted for horse stealing, and the jury found a verdict, "guilty of petit larceny," the Court *Held*, that judgment of petit larceny could not be pronounced upon the prisoner; but ordered him back for trial.—*State vs. Spurgen*, 252

IMPARLANCE.

See Practice 2.

INDICTMENT.

1. Where an indictment commenced with "South-Carolina," and not the *State* of South Carolina, and concluded against the peace and dignity of the "*said state*," and not against the peace and dignity of the *same*, the Court *Held*, that it was good and consistent with the 2d section of the 3d article of the Constitution.—*State vs. Anthony*, 285

INFANT.

1. Where the father and mother of an infant, but a few years old, died and left some property, but neither an executor nor any person to take care of their child, and a woman, who was poor, took the child and supported it for a year, and then administration was taken out upon the estate, the Court *Held*, that the woman should recover for her expenses and trouble in taking care of, and maintaining the child; and that her poverty rebutted the presumption of a gratuity, and that the humanity and policy of

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the law required that it should be paid.—*Sanders vs. Rutland*, 143

INFORMATION.

1. An information in nature of a *quo warranto*, will not lie at the suit of an individual, but must be carried on in the name, by the officer, and under the authority of the State. *Clearu vs. Delieesseline*, 35
2. An information in the nature of a *quo warranto* is not void, merely because it is filed by the order or directions of the Court.—*State vs. Delieesseline*, 52
3. On an information in the nature of a *quo warranto* against a person, to show by what authority he claims to exercise the office of sheriff, the decision of the managers is conclusive as to all matters legally submitted to them, as long as that decision remains unreversed, 16
4. A majority of the managers is a *quorum* to try the question; and the concurrence of a majority of that *quorum* is sufficient to decide it, 16
5. An information in the nature of a *quo warranto*, may be filed against an officer who holds a commission under the authority of the state. 16

INHERITANCE.

See Alien.

INNKEEPER.

1. An innkeeper is liable for all losses which might have been prevented by *ordinary care*. And, it seems, wherever it be doubtful, whether ordinary care has been used or not, the presumption is against the bailee. If he do not rebut the presumption of a want of ordinary care, arising from the loss of the goods bailed, he is responsible.—*Aron vs. Newcom*, 509
2. Where the horse of a guest was put into a stable which was very open, but which had a bar to one door and a lock and key to the other; al-

though the key was delivered to the servant of the guest, yet the innkeeper, is liable for a horse stolen out of his stable; and it seems it would have been the same, had the stable been properly constructed, 16

3. Ordinary care, is a question for the jury, 16
4. The Scotch law. See note, 511

INSOLVENT DEBTOR'S LAW

1. A defendant imprisoned under an execution in a case of slander, is entitled to the benefit of the insolvent debtors act. *Walling vs. Jennings*, 10
2. A person who has petitioned for the benefit of the insolvent debtor's act, may amend his schedule after it had been filed, unless there be fraud in it. — *Bingley vs. Smart*, 29
3. The proper time for contesting the right of the defendant, a vendue master, to the benefit of the insolvent debtor's act, is on his application for the same.—*Lowden vs. Moses & Co.* 129
4. To recover against the plaintiff for boarding an insolvent debtor, the gaoler must allege and prove that the prisoner was wholly insolvent and no assignment made, or else that the assets in the hands of the assignee, were insufficient. Such an allegation not having been made, the court gave the plaintiff leave to amend.—*Love vs. Lowry*, 181
5. *Three months* notice is necessary to entitle a defendant to the benefit of the *insolvent debtors act*.—*George vs. Catherwood*, 359
6. Where a debtor, in the prison bounds, petitions for the benefit of the *insolvent debtor's act*, and submits his schedule, and a suggestion of fraud is filed against him, under which he is found guilty by the jury and remanded to gaol, the bail is thereby discharged; for by such false schedule he is disabled from taking the benefit of either the *prison bounds act*,

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or the insolvent debtor's act.—
Dixon & Co. vs. Vanezara, 373

7. It seems that wherever the law interferes, and in any manner takes the principal from the custody of the bail, it is considered as a surrender. *16*

8. Where the defendant had been discharged under the insolvent debtor's act, from confinement, at the suit of the plaintiff, the court *Held*, that that act did not prohibit the plaintiff's suing the defendant, (1) for debts which had been paid by the plaintiff as the defendant's indorser since his discharge, but which notes were in existence at the time of such discharge; and (2dly) for debts due by the defendant to the plaintiff before the arrest and discharge, but which had not been sued on; nor on which any dividend had been received; that the law operates a discharge only as to such suits that are pending, or on the debts of those creditors, (whether suing or not) who may think proper to receive a dividend.—*Duncan vs. Brown*, 375

9. A creditor secured by mortgage (as other creditors) is bound to prove by oath his debt to be *bona fide*, at the time when his debtor takes the benefit of the insolvent debtor's act; otherwise his lien will become forfeited.—*Porteus vs. Sullivan*, 387

INTEREST.

See Damages.

1. Where money has been paid by mistake, interest can only be allowed from a demand and refusal.—*Ex'rs Simons vs. Walter*, 97

2. The defendant in an action on a bail bond cannot be liable to a greater extent than the principal was when the bail became fixed; and the original judgment and cost at the time of the return of *non inventus* is the amount for which

the bail is liable.—*Murden vs. Perman*, 128

3. And the bail is only liable for interest on the original judgment from the time when his liability became fixed by the return of *non inventus* on the *ca. sa.* against the principal; unless the judgment had been on a penal bond, where the interest would continue to run on, and then he would, perhaps, be chargeable with the accumulated amount, *16*

4. A bond bearing interest from a period anterior to its date, is not usurious.—*Levy vs. Hampton*, 145

5. Interest is recoverable upon a replevin bond; and in debt upon a replevin bond, against the security, interest is allowed from the date of the judgment against the principal.—*Stevens vs. Simmons*, 28

6. Interest cannot be recovered upon a *Scire Facias*.—*Ex'rs Mann vs. Adm'rs Taylor*, 171

7. Judgments by default are interlocutory or final, and although in actions of debt, the judgment by default is commonly said to be final, still where the action is brought on a judgment, the plaintiff is entitled to a writ of enquiry, after a judgment by default, to recover interest by way of damages for the detention of the debt.—*Smith vs. Vanderhorst*, 328

8. In an action of debt upon a judgment, which judgment had been for damages to the amount of the penalty of the bond upon which the action had been brought, the court *Held*, that the plaintiff in his action upon the judgment could recover interest by way of damages beyond the penalty of the bond, upon which the judgment was founded, *16*

9. A note in these words, "due T. N. on demand, three hundred dollars, &c." *Held* that interest would only commence from the time of a demand.—*Cannon vs. Beggs*, 370

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10. In every case of appeal (by act 1815,) where the decision is against the appellant, 7 per cent interest is allowed on the amount recovered, from the day of the verdict to the time when the appeal is dismissed.—*Ex Parte, Vance*, 495
- 11 And when in trover, the jury found an alternative verdict for \$3,000, or a return of the property converted, which property, after the dismissal of an appeal by the defendant, was returned to the plaintiff, the Court *Held* this case no exception to the general rule, and allowed interest on the \$3,000 from the day of the verdict, until the appeal was dismissed.—*Ex Parte, Vance*, 503
12. The plaintiff in an action on a penal bond, cannot recover more than the penalty where the interest exceeds it.—*Bonsall vs. Taylor*, 16
13. In debt on judgment upon a penal bond, the plaintiff can recover interest beyond the penalty, 16
- 14 Where a verdict was obtained in 1810, for a certain sum with interest from 1808, but no judgment entered up, and in 1815, an act was passed allowing interest on all judgments on debts that bore interest, until paid, and in 1820, a motion was made to enter up judgment (which had been neglected,) *nunc pro tunc*, the Court *Held*, that interest could only be collected on the execution issued upon such judgment, from 1808, till 1810, the time when the verdict was rendered.—*Ex Parte, Munn*, 589

INTESTATES ESTATES.

1. By the act of 1797, if a person die intestate, leaving neither wife, child, or children, or lineal descendant: but leaving a father or mother, and brothers and sisters, or brother and sister, or brothers or sisters, one or more, the estate, real and personal, of such intestate, must be equally di-

vided amongst the father, or if he be dead, the mother and such brothers and sisters as may be living at the time of the death of the intestate, so that such father or mother, as the case may be, and each brother and sister so left living by the intestate, shall each take an equal share of his estate, real and personal.—*Watson vs. Hill*, 161

2. Where the intestate left a mother, and brother of the half blood, the Court *Held*, that the brother, of the half blood was not entitled to a distributive share, as a brother or sister of the whole blood, under the act of 1797, but that the mother was entitled to the whole estate.—*Larson vs. Perdreux*, 456

JUDGE.

1. It is a courtesy which one Judge owes to another not to rescind or suspend an order which the other has made. But a Judge at Chambers may rescind or suspend an order made by himself *sedente curia*.—*Ex'rs. of Yancey vs. Tallman*, 474
2. By the act of 1818, a Judge at Chambers has the power "to grant writs of prohibition or mandamus and quo warranto, and to hear and determine motions to stay or set aside executions in the same manner, in every respect, as if the court was actually sitting." 16
3. A judge who has presided at the trial of a case, on the circuit, cannot set aside a verdict of a jury, rendered after a full hearing, without any allegation of surprise or mistake, or any objection made to the time or manner of the trial, but simply because the verdict is alleged to be intrinsically against law or evidence: It must be by appeal to the constitutional court.—*Ex'rs. Thomas vs. Brown*, 557
4. It seems cases have occurred wherein verdicts taken by surprise or inadvertency, have been set aside by the presid-

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ing judge; but none, where the objections were to the merits of the verdict, and not to the manner or time of trial, *16*

JUDGMENTS.

See Lien.

1. A transaction between two parties in a judicial proceeding is not binding upon a third; therefore in an action for wages as mariner and master of the defendant's sloop, a decree of the admiralty between A. and the plaintiff is inadmissible.—*McEachern vs. Cochran*, 338

JURISDICTION.

1. It is sufficient to show that the parties all lived in the city of Charleston, and that the proceedings were carried on there, to give jurisdiction to the City Court, without proving that the watse was committed there.—*Thomas vs. Dyott Admr.* 76
2. *Quere.*—If a Corporation of another State can maintain an action in this state, in its corporate name?—*Brown, Green & Co. vs. Minis*, 80
2. The summary process jurisdiction of this Court is not concurrent with the jurisdiction of the Court of Equity. It only furnishes a different method of trying cases within the jurisdiction of the Court before such proceedings were established.—*Taylor vs. Drake* 174
3. A citizen and resident of Rhode-Island may sue a citizen of South-Carolina, resident of Charleston, in the city court of Charleston.—*Green vs. Smith*, 324
1. Indeed it seems that any person competent to sue, may institute an action in the city court against any inhabitant who resides within the city, to the extent of (\$500) the jurisdiction conferred, 16
1. It seems also that where the defendant resided in Charleston, and ordered goods to be sent to her, that the contract

will be considered as arising in Charleston. *16*

6. The jurisdiction of Charleston extends to the northernmost line of Boundary-street.—*Hinton vs. City Council*, 345
7. The act of 1764, giving powers to the commissioners of the streets in Charleston to make drains and assessments to pay for the same, has been repealed by the acts of 1783 and 1785; and the city ordinance of 1806, is now in force, and the only rule of action for the City Council in making drain assessments. And the court granted a prohibition to restrain the council from levying a fine assessed in a different manner from that provided by that ordinance. *16*
8. A magistrates jurisdiction extends in cases of domestic attachments to §20, and is not confined to §1.—*Roberts vs. Brown*, 498

JURY.

See Necessaries.

1. The jury cannot be polled, but at the discretion of the Court.—*Martin vs. Maverick*, 24
2. The jury only can determine what are the necessities for a ship.—*Burquin & Co. vs. Fern*, 516
3. Peril of the sea or not, is a question for the jury.—*Marsh & Howren ads Ex'r Blythe*, 360
4. Whether any and what kind of notice will dispense with the necessity of recording a deed, are questions for the court; but whether the party had or had not such notice, is a question for the jury.—*Tart vs. Crawford*, 479
5. Ordinary care, is a question for the jury.—*Aron vs. Newson*, 509
6. The right of polling the jury is not attached to either the plaintiff or defendant, (in state as well as civil cases.) It is a mean to which the court sometimes resort, to ascertain if the jury are agreed on their verdict; but when the court

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is fully satisfied with the verdict, by other more accustomed means, it will not resort to it.—*State vs. Allen*, 525

7. In prosecutions for libels in this state, though not by the common law of England, the intention with which the publication was made, as well as the fact of publication and truth of the innuendoes, are involved in the general issue, and the whole case, *law as well as fact*, is resolved by a general verdict, 16

JUSTICE OF THE PEACE. *See Attachment. Magistrate.*

LANDLORD AND TENANT.

1. Upon an agreement to rent a house and lot, out of the rent of which was "to be deducted any repairs that may be done to the same," the Court *Held* that the erection of a shed to the stable, a fowl-house, and — house were not repairs.—*Darby vs. Farrow*, 517

LARCENY. *See Horse Stealing.*

LEASE.

1. Upon a covenant for the lease of a lot, whereon lessee covenanted to build, which buildings, at the expiration of the lease were to be valued by indifferent persons, and at which valuation the lessor was to take the buildings, *he paying for the same* in one, two, and three years from the expiration of the time; the Court *Held*, that the payment for the houses, was not a covenant precedent to the delivery of them. *Munigault vs. Carroll*, 91

LEGACY.

1. The testator bequeathed all of his negroes to be divided equally among his grand children, share and share alike, among such as should be living at the time of such division, and not otherwise; and that the division should take

place so soon as the debts be paid. A sale was made by the executor to enable each legatee to purchase in the amount of his share, and the husband of one of the legatees purchased two negroes, and gave the executor a bond and mortgage for the same, endorsed, "given as security in case of any demands or suits coming against the estate, or till a final settlement take place." After this, a bill was filed, and a partial decree made for partition; but yet no division made; and then the wife of the purchaser died. *Held*, that by the sale, the debts were to be presumed paid, and that the legacy, by this sale, was placed by assent of the executor in possession of the husband, and that he could not revoke it, or recall the property, on the ground, that no division had been made.—*Ex Parte, Ex'rs Stephens*, 67

2. Where the defendant was executor of the plaintiff's husband, and the plaintiff had a life estate, under the will, in the whole estate, and she continued to live on the plantation, where all the estate was, and had the same in use, the Court *Held*, that the executor had a right to sell a mare and colt to pay the debts of the testator, and that the widow remaining on the place, where she had a right to be, and where testator's property ought to be kept, and of which she ought to have had the use, could not be regarded as an unconditional assent to her taking the legacy, so as to divest the executor of the right of possession.—*Johns vs. Johns*, 132

LIBEL.

1. In prosecutions for libels in this state, though not by the common law of England, the intention with which the publication was made, as well

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as the fact of publication and truth of the innuendoes, are involved in the general issue, and the whole case, law as well as fact, is resolved by a general verdict.—*State vs. Allen*, 525

LIEN.

1. A Factor cannot pledge the goods of his principal for his own debt. But it is equally clear, that when a Consignee acts within the scope of his authority, and employs a sub-agent to carry that authority into execution, as by selling goods consigned to him, or doing any other act within that authority, that such sub-agent has a lien on the goods upon which he has made advances for the purposes of a sale.—*Bowie & Sons vs. Napier & Co.*
2. A. recovered a judgment against B. and assigned it to the Bank of Georgia for valuable consideration. Afterwards C. a creditor of A. sued out a writ of attachment against A. and a copy of the writ was served upon B. as garnishee. The Bank filed a suggestion, stating its claim; to which C. demurred, on the ground that the Corporation was a creature of another State, and could not prosecute a suit in this. *Held*, that the suggestion of the Bank substantially alleged, and the demurrer consequently admitted that the Bank had a corporate existence, and that the judgment had been assigned for valuable consideration; which assignment operated so as to divest the absent debtor of all property in the judgment, and it was not therefore subject to the attachment.—*Brown, Green & Co. vs. Minis.* 80
3. An order drawn upon an agent in possession of funds, out of which it is to be satisfied, when accepted, fixes the fund irrevocably, and is a good assignment thereof. And the

funds do not become assets upon the death of the drawer.

—*Napier & Co. vs. Ex'rs Lacombe*, 106

4. Where a person drew an order upon his agent, who was in possession of funds for the purpose of selling, upon which the agent himself had a lien, and the order was accepted, and the drawer then died, the Court *Held*, that it was essentially an assignment for valuable consideration, and that the agent might sell the property, retain his debt, and pay the order, without making himself liable as executor *de son tort*, 16 107

5. A creditor secured by mortgage (as other creditors) is bound to prove by oath his debt to be *bona fide*, at the time when his debtor takes the benefit of the insolvent debtor's act; otherwise his lien will become forfeited.—*Porteus vs. Sullivan*, 397

6. Where a mortgage for certain lots was duly recorded, subsequent to which several suits were commenced against the same mortgagor, and judgments were obtained, and executions lodged, and the lots in question were levied on and sold, and at the sale the mortgagee purchased them, the question was whether the mortgagee or the other creditors were entitled to the money? And the court *Held* that the judgments were first entitled to be satisfied.—*Ex Parte City Sheriff*, 399

8. Where a *f. fa.* was lodged in the office of the sheriff of the district of Charleston, marked "*lodged to bind*," which the court considered as a stay, and a *f. fa.* subsequently delivered to the City sheriff with an order to "*levy and sell*," and the City sheriff accordingly sold the personal property of the defendant, and had the proceeds in his hands; upon a rule the Court *Held*, that the execution first deli-

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- tered should be first paid.—
Greenwood vs. Naylor, 414
9. An execution stayed does not lose its *binding efficacy*, only its *active quality*; and one being lodged in the office of the sheriff of the *district* of Charleston, and the other in the office of the *City* sheriff of Charleston, does not vary the application of this rule, 1b
10. An attachment creates a lien, which nothing subsequent can destroy, but the dissolution of the attachment, on the conditions mentioned in the act; therefore a junior execution must be postponed to it.—*Goore & Danavani vs. Mc Daniel*, 480
- ### LIMITATION, STATUTE OF.
- See Pleading, 5.*
1. In trespass to try titles, if the plaintiff die *pendente lite*, and leave minors, the statute of limitations cannot run during their minority.—*Cook vs. Wood*, 139
2. The Court divided as to the question—Whether the statute of limitations, after it has once commenced to run, can be stopped by any disabilities? 1b
3. Where the actual possession of one claiming title under the statute was without the bound of the plaintiff's grant, he could acquire no title by constructive possession to any part of the plaintiff's tract over which his prior grant run.—*Turnipseed vs. Busby*, 279
4. A title cannot be acquired under the statute of limitations, where the party to be affected by the possession had no right to sue, 1b
5. An interrupted possession will not give title, 1b
6. The Statute of Limitations cannot be given in evidence under the general issue in an action of trover, but must be specially pleaded.—*Jones vs. Dugan*, 429
7. The acknowledgments of one of several makers of a joint and several promissory note, that the debt is still due, is sufficient to take the case out of the statute, as to the others; and such an acknowledgment may be given in evidence, in a separate suit against any of the others, and will be conclusive, unless counteracted by opposing testimony.—*Beitz, adm'r vs. Fuller*, 541
8. Minors (by the act of 1788,) have *five* years after coming of age, to prosecute their claims if to land, and *four* years if to personal property; and it is the same, whether at the time of their coming of age, they were within or without the state.—*Edson vs. Davis*, 555
9. If the plaintiff commence his action for the recovery of land, within the five years, and such action be nonsuited, discontinued or in any other way be let fall, he or any one claiming under him, may, yet nevertheless, within two years of such nonsuit, &c. commence his second action for the recovery of such lands, and it will not be barred by the statute. E
10. To a claim for work and labor, the statute of limitations does not commence to run from the time the contract was made, but from the time the work was finished. A promise to pay, always continues up to time the work is done.—*Zeigler vs. Hunt*, 577
- ### LOCATION.
- See Surveying.*
- ### MAGISTRATE.
1. A magistrate's jurisdiction extends in cases of domestic attachments to §20, and is not confined to 31.—*Roberts vs. Brown*, 498
- ### MASTER.
1. It seems, that a master of a ship, by the ancient marine law, when a seaman is sick or disabled, is bound to provide every thing necessary for his re

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covery, and has a right to deduct the amount out of his wages.—*McBride, Ex'rs. vs. Watts*, 384

MONEY.

1. *Paper medium* is not money; for by the 8th and 10th sections of the Constitution of the United States, Congress alone has the right to coin money; and no state can coin money, emit bills of credit, or make any thing but gold and silver coin a tender.—*Lange vs. Kohne*, 115

1. Where money is paid by a debtor to a creditor who has several demands against him, and no directions given how it shall be applied, the creditor may apply it as he pleases; therefore, where the creditor holds two bonds of his debtor, both due, and payable with interest, and money be paid him without directions as to its application, he may apply it to the part extinguishment of the principal and interest due at the time on both bonds; and he is not bound to apply it to one bond until it be satisfied, and then to the other.—*Smith vs. Screen*, 368

MORTGAGE.

1. A creditor secured by mortgage, (as other creditors) is bound to prove by oath his debt to be *bona fide*, at the time when his debtor takes the benefit of the insolvent debtor's act; otherwise his lien will become forfeited.—*Porteus vs. Sullivan*, 397

2. Where a mortgage for certain lots was duly recorded, subsequent to which several suits were commenced against the same mortgagor, and judgments were obtained, and executions lodged, and the lots in question were levied on and sold, and at the sale the mortgagee purchased them, the question was whether the mortgagee or the other creditors were entitled to the mo-

ney? And the court *Held* that the judgments were first entitled to be satisfied.—*Ex Parte Sheriff*, 399

NATURALIZATION.

See Alien.

NECESSARIES.

1. An owner is generally only responsible for necessities to his ship; but the jury only can decide what are necessities.—*Burgin & Co vs. Flinn*, 316

2. What are necessities for an infant is a question of law for the court. How much and of what quality, must depend upon the infants pecuniary circumstances, and of these, the jury are to judge.—*Glover & Co. vs. Admr. of Ott*, 572

3. Lodging, clothing, food, medicine and education, are necessities to every infant; such articles, therefore, as come under such heads, must be allowed; but liquor, pistols, powder, saddles, bridles, whips, fiddles, fiddle-strings, &c. are not to be allowed, *Id*

NEGRO.

1. A free negro is an incompetent witness in any case where the rights of white persons are concerned.—*White vs. Helmes*, 430

NEW TRIAL.

See Practice.

1. It is very much to be doubted whether a person ought ever to be convicted of a felony on the uncorroborated testimony of a prosecutor who claims the property in question, where the defendant sets up a title in himself; and where the transaction was attended with none of the usual concomitants of larceny, as concealment, &c. the court, upon conviction will grant a new trial.—*State vs. Kane*, 432

NOTICE.

See Co-Partners and Co-Partnership.

1. Wherever a subsequent pu-

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chaser has received explicit notice of a former conveyance, such conveyance though not recorded will be valid, legal, and effectual against the subsequent conveyance of such purchaser, though recorded in due time.—*Tart vs. Crawford*, 265

2. Three months notice is necessary to entitle a defendant to the benefit of the insolvent debtors act.—*George vs. Catherwood*, 339

3. Where a demand on the drawer of a bill of exchange cannot be made, the law does not dispense with notice to the endorser. The circumstances which prevent the demand and notice of non-payment, should still be given. And such notice should be given in as short a period after ascertaining that the demand could not be made, as if the demand had been made, viz. as soon as shall be conveniently practicable.—*Price vs. Young*, 16

4. Where the holder lived on James Island, and the drawer in Charleston, and the note became due on the 26th October, and notice not given until the 10th of November, the Court Held, that the notice was not given in time, 16

5. Notice of a dissolution of co-partnership, published in a Gazette, which was taken by the bank, was Held a sufficient notice to the bank; though the defendant had had dealings with the bank.—*Bank So. Co. vs. Humphreys & Mathew*, 388

NUISANCE.

1. A thoroughfare or way, by water or land, leading from one highway to another, is a highway, the stopping of which is a nuisance, for which an indictment will lie.—*State vs. Duncan*, 461

OBLIGATION.

See Bond and Deed.

OFFICE.

1. The tenure by which an office is held, does not depend upon the commission which the governor may think proper to give. It is only evidence of the appointment. The tenure must depend upon the provisions of the act creating the office, or upon the Constitution.—*State vs. Jeter*, 233

2. No office exists in this state by prescription, 16

3. As the constitution has not prescribed the tenure by which a solicitor shall hold his office, the act creating the office is the proper source from which that information is to be derived, 16

4. The act of 1791, has given to the solicitors all the privileges, emoluments and advantages of the Attorney-General, and subjected them to all his duties; and the tenure by which they hold is the same, 16

5. By the Constitution of 1776, the Attorney-General held his office during good behaviour. By the Constitution of 1778, it was declared, that the Attorney-General should hold his office for the term of two years, and until a successor should be appointed. The Constitution of 1776 was repealed by that of 1778, and the Constitution of 1778, as far as it concerns the Attorney-General, was not repealed by that of 1790. The Attorney-General, therefore, must have held in 1796, under the Constitution of 1778, and the act of the legislature of 1791, giving to the solicitors all the privileges, &c. of the Attorney-General, must have intended to limit the solicitor's office to two years, and until another was appointed, 16 234

6. A person elected ordinary under the act of 1812, which limits the duration of office to four years, is in under the constitution, and is entitled to hold his office during good behaviour, although commission

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ed only for four years.—*State vs. Lyles*, 238

7. Ordinaries, by the third article of the constitution of this state are judicial officers, and hold their offices during good behaviour; and where the governor, under the act of 1815, appointed an ordinary to fill a vacancy, although the act authorizes him only to make a temporary appointment until an election shall take place, yet the ordinary being in office, he is in under the constitution, and holds during good behaviour.—*State vs. Hutson*, 240

8. By the constitution, the sheriffs hold their offices for the term of four years; and where the governor, under the act of 1808, appointed a sheriff to fill a vacancy, until an election should take place, such sheriff, being in office, is in under the constitution, and holds his office for four years.—*State vs. McClintock*, 245

ORDINANCE.

See *Charleston*.

ORDINARY.

See *Constitution, Offices*.

OUSTER.

1. The possession of one tenant in common is the possession of both; and although the unity of possession be destroyed by an actual ouster, that ouster must be either positively proved, or such circumstances must be proved as would support the presumption of an ouster.

Allen vs. Hall, 131

. And the declaration of a witness (whose credit was extremely doubtful) that the possession of the defendant had been adverse, but not stating why he thought it adverse, nor when it became so, was held not sufficient evidence of an ouster, 1b

PAPER MEDIUM.

At common law, no chose in action is assignable; and

the statute of Ann, and our Act, making notes payable in money assignable, do not include notes payable in paper medium. And a verdict obtained by an assignee will be arrested.—*Lange vs. Kohne*, 115

2. Paper medium is not money; for by the 8th and 10th sections of the Constitution of the United States, Congress alone has the right to coin money; and no state can coin money, emit bills of credit, or make any thing but gold and silver coin a tender, 1b 115

PARDON.

1. By the 7th section of the second article of our Constitution, the Governor has the power to grant reprieves and pardons, after conviction, except in cases of impeachment, in such manner, on such terms, and under such restrictions, as he shall think proper.—*State vs. Fuller*, 178

2. And where the Governor pardoned a *feme covert* upon condition that she should leave the state in two weeks, who neglected to go, the Court will consider such pardon as void, after the two weeks, and upon motion of the solicitor will pass sentence upon her, 1b

PARTIES.

1. All the parties to a joint contract must be sued; and although the sheriff returned *non inventus*, as to one, and that he had left the state, and the declaration stated the facts, yet a plea in abatement for the *non joinder* was supported.—*McCall vs. Price*, 82

PARTITION.

1. In cases of partition, costs are to be paid by all the parties concerned.—*Gibson vs. Brown*, 162

2. Under the act of 1791, the circuit court has not the power to issue writs of partition, but in cases of *intestacy*; but where land has been devised

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for life only, without any ulterior disposition by the will, the court will grant a writ of partition of the remainder over, as in other cases of intestacy.—*Witherspoon vs. Dunlap*, 546

3. The above act (of 1791,) authorizes the appointment of surveyors, as in cases of dower, to run the lines between the lands to be divided, as other lands, as well as the lines between the divisions into which the land is to be partitioned; and to ascertain such division lines, reference may be had to the will devising the particular or life estate, in order the better to admeasure the remainder, undevised; for wherever a power is given, every thing essential to its exercise, is impliedly conferred, *Id*

4. By the act of 1748, in all cases where any land shall be given or descend to any person in coparcenary, joint tenancy or in common, such person or persons, as soon as they become of age, may apply to the circuit court for a writ of partition, and if any such persons, twelve months after becoming of age, neglect to do so, then the guardian of him or them not of age may apply, *Id*

5. And where there are no guardians, the circuit court under the act of 1808, has all the power appertaining to the court of equity, (besides the common law power of appointing *ad litem*) of appointing guardians, so far as the rights of minors are concerned, in the partition of estates either real or personal, under the act of 1791, as well as all other acts relative to the partition of estates, real or personal, *Id*

6. A return made by the commissioners, in a case of intestacy, cannot be refused, because the guardians of the minors concerned, "had not entered into bond and security."
—*Grant vs. Grant*—in note, 550

PARTNERS.

See Co-Partners.

PAYMENTS.

1. Where money is paid by a debtor to a creditor who has several demands against him, and no directions given how it shall be applied, the creditor may apply it as he pleases; therefore, where the creditor holds two bonds of his debtor, both due, and payable with interest, and money be paid him without directions as to its application, he may apply it to the part extinguishment of the principal and interest due at the time on both bonds; and he is not bound to apply it to one bond until it be satisfied, and then to the other.—*Smith vs. Screven*, 368
2. The defendant, paying money over to the sheriff, on an execution, cannot be considered as paying it voluntarily; and if improperly paid, the sheriff, upon a rule may be ordered to pay it back — *Levy vs. Roberts*, 395

PERIL OF THE SEA.

See Common Carriers.

1. Where two vessels were passing in a narrow channel (about 400 yards across,) both going the same way, and it became apparent that they were about to run afoul of each other, it was the duty of the vessel to windward to keep away; especially when she was warned of the danger; and the owners of such vessel not giving the way, and who might have given the way, are liable for the losses sustained by the vessel so run afoul of.—*Err. of Bytle vs. Howerin and Marsh*, 360
2. Where two vessels meet in such a situation that neither can avoid the collision, it is a danger of the sea, but not otherwise, *Id*
3. Whether peril of the sea or not, is a question for the jury, *Id*

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PERJURY.

See Pleas and Pleading, 4.

1. Where an attorney was convicted of an attempt to suborn a witness to commit perjury, the Constitutional Court ordered him to be stricken from the roll of attorneys.—*State vs. Holding*, 379

PLEAS AND PLEADING:

1. The Court, at its discretion, may grant a motion to plead double at any time, so as not to operate a surprise on the plaintiff; and the plea of *non demiset*, and "no rent in arrear," may be pleaded together.—*Van Hotten vs. Lewis & Peepen*, 12
2. In an action of slander for words spoken by the husband, words spoken by the wife cannot be joined; and it is a subject for arrest of judgment if the wife be joined for words spoken by the husband alone.—*Penters vs. England et ur*, 14
3. In an action of detinue, the damages were laid in the declaration to be only \$100, and the verdict was for the article detained or its value \$100, and \$100 damages; *Held* that it was not a cause for arrest of judgment, on the ground that the verdict exceeded the damages laid in the declaration.—*Laborde vs. Rumph*, 15
4. It is not necessary, in an indictment for attempting to suborn a witness, that the fact which the defendant attempted to procure the witness to swear to, should be stated specifically; as that fact would only be evidence to shew *quo animo*, the bribe was offered, which may be shown by other circumstances.—*State vs. Holding*, 31
5. Where the plea of the statute of limitations has been put in, after a cause had been several Courts at issue, and it does not appear that notice to the opposite party had been given, nor the leave of the Court obtained, it may be

- stricken out on motion.—*Mel-ler vs. Ex'rs Fisk*, 50
6. A. recovered a judgment against B. and assigned it to the Bank of Georgia for valuable consideration. Afterwards C. a creditor of A. sued out a writ of attachment against A. and a copy of the writ was served upon B. as garnishee. The Bank filed a suggestion, stating its claim; to which C. demurred, on the ground that the Corporation was a creature of another State, and could not prosecute a suit in this. *Held*, that the suggestion of the Bank substantially alleged, & the demurrer consequently admitted that the Bank had a corporate existence, and that the judgment had been assigned for valuable consideration; which assignment operated so as to divest the absent debtor of all property in the judgment, and it was not therefore subject to the attachment.—*Brown, Green & Co. vs. Minis*, 80
7. All the parties to a joint contract must be sued; and although the sheriff returned *non inventus*, as to one, and that he had left the state, and the declaration stated the facts, yet a plea in abatement for the *non joinder* was supported.—*McCall vs. Price*, 82
8. Where a party demurs for informality, the Court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective.—*Stoney vs. McNeile*, 85
9. No man can make an averment against his own deed; and where the defendant gives a bond to A. he cannot plead that the bond was given to A. for the benefit of a co-partnership, of which A. was a member. 16
10. *Trespass vi et armis* is the proper action for beating plaintiff's slave.—*Goddard vs. Wagner*, 100
11. Where a new remedy or a

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new cause of action is given by statute, the plaintiff who would avail himself of either, must bring himself within the statute.—*London vs. Moses & Co.* 120

12. Where a party brings an action against a vendue master to recover money for goods which he had sold, and sets forth in his declaration that the defendant was indebted as *vendue master*, to entitle the case to a preference on the docket, a demurrer, assigning for cause, that the declaration did not state whether the plaintiff proceeded at common law or under the statute, will be overruled, 1b

13. If the defendant think proper to dispute the right of the plaintiff to a preference on the docket, in suits against vendue masters, he can always do so by his pleading, 1b

14. The parties referred their disputes to five arbitrators. Award by three for the plaintiff. Two dissented. An action was brought on the award, to which the defendant demurred, because the five arbitrators should have concurred. Demurrer overruled.—*Pearson vs. Black*, 137

15. In debt, against the sheriff, under the act of assembly allowing a person 50 per cent against him for money collected and not paid over, the allegation of non-payment is a sufficient assignment of the breach.—*Kelly vs. Payne*, 138

16. In the case of defendants, if a party be omitted, the objection cannot be taken under the general issue, where it did not appear on the face of the declaration, or on any other pleading of the plaintiff, that the party omitted, jointly contracted and was still alive.—*Harper vs. Williamson*, 156

17. If the trespass be of a permanent nature, in which the injury is continually renewed, the declaration should state it with

a *continuando*.—*Sanders vs. Palmer*, 161

18. Where a remedy under a statute is given, it must be strictly pursued, and it must appear on the face of the proceedings, that the plaintiff's case is such as to authorize him to recover under the act.—*Love vs. Lowry*, 161

19. To recover against a plaintiff for boarding an insolvent debtor, the gaoler must allege and prove that the prisoner was wholly insolvent and non-assignment made, or else that the assets in the hands of the assignee were insufficient. Such an allegation not having been made, the court gave the plaintiff leave to amend, 1b

20. Where an attaching creditor gave a bond to the garnishee to indemnify him, for the delivery up of property belonging to the absent debtor, and the garnishee sued on the bond, to which the defendant pleaded performance, the court *Held*, that a replication assigning for breach that another attaching creditor had recovered against the plaintiff a certain sum due by the absent debtor, was a departure and no breach of the bond; and a demurrer to it on that ground was supported.—*Richardson vs. Lerick*, 151

21. Where the parties go to trial with the proceedings in an unfinished state, the party in default shall not be permitted to take advantage of it.—*Adm's Porter vs. Kenny*, 205

22. Whatever is alleged on one side, and not denied on the other, shall be taken as true, 1b

23. Case as well as *trespass vi et armis* is a proper action for criminal conversation.—*Murray vs. Townsend*, 206

24. A variance between the writ and declaration cannot be taken advantage of on a motion to arrest judgment.—*Ib.* 207

25. A variance between the

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- writ and declaration may be taken advantage of by a special demurrer.—*Young vs. Grev*, 211
26. Where the assignee of an open account sues in his own name, and declares on a promise made to himself, and the defendant confesses judgment, the court will not suffer that judgment to be arrested for such irregularity.—*Matheson vs. Crain*, 219
27. Where a person was indicted for horse stealing, and the jury found a verdict, "guilty of petit larceny," the court *Held*, that judgment of petit larceny could not be pronounced upon the prisoner; but ordered him back for trial.—*State vs. Spurgeon*, 252
28. A recovery in an action of trespass on lands, is a bar to an action to recover mesne profits, for use and occupation of the same land, anterior to the verdict in trespass.—*Coleman vs. Parish*, 264
29. Where the plaintiff takes a decree against an executor or administrator, subject to a plea of *plene administravit propter*, he thereby admits that the administration has been correct up to that period. And any objection as to the non-return of any article in the inventory ought to have been made by the plaintiff on the trial of the case, and cannot be excepted to on the trial of an action, upon such decree, suggesting a *devastavit*.—*Summers vs. Tidmore*, 270
30. The assignee of a replevin bond may bring an action upon it in his own name.—*City Council vs. Price*, 299
31. To an action for false imprisonment, the defendants pleaded "not guilty within four years," (whereas the act requires but one to bar the action) "next before the suing out of the original writ." The plaintiff replied that he had sued out the writ within the time required by the law.
- To this replication, the defendants demurred, and assigned for cause, that the replication was vague and uncertain, in not denying the defendant's plea, nor in specifying the time within which the writ was issued; the court *Held*, that if the plea was defective, (which it did not seem to think,) it could only be taken advantage of by a special and not a general demurrer; which advantage was waived by the plaintiff's replication: and that the replication was also defective, inasmuch as it did not deny the allegation in the defendant's plea, nor specify the time within which the action was commenced.—*Sergeant vs. Johnson, et. al.* 336
32. The rule that the court will look back through all the proceedings, and give judgment against the party who has been guilty of the first fault in pleading, applies only where the preceding pleadings were defective in substance and not merely in form, and such as would be aided on a general demurrer. *Id*
33. A motion in arrest of judgment, because the declaration neither states the day nor the year, when the wrong complained of was committed, and that it did not state that any definite quantity of rice was lost, but (merely stated that — bushels were received on board and lost, comes too late after verdict. The advantage should have been taken by pleading. The day of the loss and the quantity lost were proved on the trial.—*Ex'r Blythe vs. Howren & Marsh*, 260
34. A Judge may grant further time to issue a writ or make up a proceeding, which had been before ordered, at any time, within a year and a day after the first order, is so usual, and has been so common, that the practice is not to be disturbed at this day.—*State vs. Clarke*, 382

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35. On a plea of *non est factum* to a bond, under the act of 1802, any competent witness may prove the hand-writing of the obligor in the place of the subscribing witness, unless the plea of the defendant be verified by his oath.—*Ex'rs. Manigault vs. Deas*, 391
36. Interest has been too often allowed upon a balance of accounts, after it has been acknowledged, to be now disputed.—*Barrell & Torre vs. Brown & Moses*, 449
37. Interest may be recovered upon a count for money had and received; and in all cases of certain or liquidated damages, *1b*
38. The general rule is that no plea shall state two or more facts, either of which would of itself, independently of the others, constitute a sufficient ground of defence; but the defendant is not precluded from introducing several matters into the same plea, if they constitute parts of the same entire defence, and form one connected proposition.—*Beckley vs. Moore*, 464
39. But where to debt on a sealed instrument payable to the plaintiff or bearer, was plead *solvit post diem*, "to one *J. Newby*, who was the bearer of the said writing obligatory," the Court Held that though it would not pronounce the plea bad for informality, yet there being no necessity for any thing more than a general plea of payment, to discountenance prolixity, so much should be stricken out as alleged payment to *Newby*, *1b*
40. Where the plaintiff sued as assignee of one *Alexander*, the Court refused to amend his declaration, and suffer him to state *Alexander* as the plaintiff, and to strike out his own name.—*Johnson vs. Mayrant*, 484
41. The only case in which a party can aver against the consideration expressed in his own deed, are when it is *illegal* or *fraudulent*; and a person cannot allege that a bill of sale was not given by him at the time the contract was entered into, but three or four weeks afterwards.—*Garrett vs. Stuart*, 514
42. Where on an indictment for a riot, against the defendant and two others named, with "divers other persons, to wit, to the number of five," without alleging that the five others were unknown, or setting out their names, and the grand jury found a true bill, only against the defendant and no other, to which the defendant pleaded guilty, the court arrested the judgment.—*State vs. O'Donald*, 532
43. Defects in a replication must be taken advantage of by special demurrer.—*State vs. Wiggins*, 568
44. Where the plaintiff's were stated to be the successors of the treasurers to whom the bond in suit was given, if the defendant objects to their being the successors, he must plead it in abatement, *1b*
45. To an action upon the sheriff's bond, *non est factum*, and performance were pleaded. Issue on the first, and replication that the defendant had collected a certain sum and had not paid it over, pursuant to the order of court; to which the defendant demurred generally. The court overruled the demurrer, the jury found for the plaintiff, on the issue of fact; the Court ordered the condition of the bond to be submitted to the jury, to assess damages, *1b*
46. A wife cannot commit a trespass (so as to be made liable to an action) in the presence of, and in connexion with her husband. In such case, she is supposed to act under his authority, and he alone must be sued.—*McKeown vs. Johnson*, 578
47. Where the trespass is committed by the wife alone, the

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husband must be joined in the action; but the declaration must state that it was so committed by the wife,

Ib

48. An action on the case, for jointly enticing and harbouring a slave, will not lie against husband and wife; the declaration should state the enticing and harbouring to have been done by the wife solely,

Ib

POLLING THE JURY.

See Jury.

POSSESSION.

See trespass to try Titles. Limitations.

PRACTICE.

See Pleading 1.

1. A person who has petitioned for the benefit of the insolvent debtor's act, may amend his schedule after it has been filed, unless there be fraud in it.—*Bingley vs. Smart*, 29
 2. When a person is sued for money received for goods sold by him as vendue-master, he is not entitled to an imparlance.—*Misraon vs. Frean*, 38
 3. But whether he acted in the capacity of vendue-master or not, is a question of fact, to be tried by the jury, and not by the Court, *Ib*
 4. Where the plea of the statute of limitations has been put in, after a cause had been several Courts at issue, and it does not appear that notice to the opposite party had been given, nor the leave of the Court obtained, it may be stricken out on motion.—*Miller vs. Exrs. Fisk*, 50
 5. An information in the nature of a *quo warranto*, will not lie at the suit of an individual, but must be carried on in the name, by the officer, and under the authority of the state. *Clearv vs. Delleselinc*, 35
- An information in the nature of a *quo warranto* is not void, merely because it is filed by he order or directions of the Court.—*State vs. Delleselinc*, 52

7. On an information in the nature of a *quo warranto* against a person, to show by what authority he claims to exercise the office of sheriff, the decision of the managers is conclusive as to all matters legally submitted to them, as long as that decision remains unreversed, *Ib*
8. A majority of the managers is a *quorum* to try the question; and the concurrence of a majority of that *quorum* is sufficient to decide it, *Ib*
8. An information in the nature of a *quo warranto*, may be filed against an officer who holds a commission under the authority of the State, *Ib*
9. Where a party demurs for informality, the Court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective.—*Stoney vs. M'Neile*, 85
10. On a rule against the sheriff, to pay money over to a mortgage in preference to an execution or attachment, which mortgage, though not recorded, plaintiff's counsel contended took priority to judgments, executions, &c. The Court refused to decide the question of priority on a motion, as it involved facts which could alone be tried by a jury.—*Ex Parte Exr. Stephens*, 88
11. Where an attorney was absent when his cause was called, and the case went to the jury, and a verdict brought in and delivered to the clerk, but not recorded, and he obtained the consent of the opposite party to open the case, the court, after hearing an insufficient affidavit for a postponement, refused to set aside the verdict and to open the case; as it conceived from the affidavit, that the defendant could not make out such a case as would authorize a departure from its long established rules.—*Allen vs Donelly*, 113

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12. A judgment and execution in attachment against the garnishee will not be set aside on the ground of the negligence or ignorance of his attorney. And it seems his only recourse is against his attorney, if he neglects to do his duty. And an order made by the circuit court to set aside the judgment, and to give the garnishee time to make his return, will be set aside.—*Foster vs. Jones*, 116
13. The garnishee has no right to question the regularity of the proceedings against the absent debtor, 116
14. As a security to the absent debtor, the plaintiff in attachment is required to make oath to the debt or sum demanded; but it seems the oath is not required to be recorded or filed; it is only a part of the evidence on which the Court is to bottom its judgment, 116
15. The proper time for contesting the right of the defendant, a vendue master, to the benefit of the insolvent debtor's act, is on his application for the same.—*Lowden vs. Moses & Co.*, 120
16. The fee bill does not allow §5 36 "for special matter and argument" in a summary process case, as in others.—*Grimes vs. Gwenn*, 137
17. A party may bring an action upon a magistrate's decree, although the execution had issued, and property levied on, but where the following endorsement was made by the constable upon the execution, "no further proceedings, the property given up to the defendant, as there were executions at the sheriff's office binding the property, of which notice was given me."—*Todd vs. Williamson*, 148
18. Where a Judge has granted an order to docket a cause, that order can only be set aside by the Constitutional Court.—*Macon vs. Mathis*, 172
19. A Fi. Fa. and Ca. Sa. can both be taken out at the same time and in the same case; but only one can be executed. *State vs. Guignard*, 176
20. It is at the discretion of the court to continue a case on the part of the state.—*State vs. Patterson*, 177
21. Before the securities of the sheriff can be sued on their bond, a *nulla bona* must have been returned on some fi. fa. against the sheriff.—*Treasures vs. Sec. Newby*, 184
22. If the sheriff have been sued first, and *nulla bona* returned, then no imparlance will be allowed his securities in the particular case in which such return may have been made, 184
24. Where the parties go to trial with the proceedings in an unfinished state, the party in default shall not be permitted to take advantage of it.—*Adm'r Porter vs. Kenny*, 205
25. Where a decree in a Summary Process had been given against a defendant on the first day of court, upon his making the following affidavit, on the second day, the court ordered the decree to be opened, that defendant might make his defence, viz: "that on Monday morning, (which was the day on which the court sat) a negro child, the property of the defendant had been found dead, which was supposed to have been murdered, and that that circumstance alone prevented his entering his appearance within the regular time, and that he had been informed by his counsel that he had a substantial defence."—*Parr vs. Evans*, 283
26. Judgments by default are interlocutory or final; and although in actions of debt, the judgment by default is commonly said to be final, still where the action is brought on a judgment, the plaintiff is entitled to a writ of enquiry after judgment by default, to recover interest by way of da-

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- images for the detention of the debt.—*Smith vs. Vanderhorst*, 328
27. The court in a doubtful case, will not, on motion, set aside a foreign attachment, on affidavit that the debtor was in the state at the time of issuing the attachment; nor upon affidavit that the debtor within a year and a day had taken the benefit of the insolvent debtor's act, which act prohibits any suit from being brought against such debtor or a year and day, and which year and day had not expired before the suing out of this attachment.—*Shrewsbury vs. Pearson*, 331
- Difference between foreign and domestic attachments.—*Ib.* 332 in note.
- Where the verdict is for damages beyond the amount bid in the writ, the plaintiff must enter a *remittitur* for the plus, or a *venire de novo* will be awarded.—*Givens et. vs. Porteus*, 379
- A writ (of *certiorari*,) which had been allowed, must be considered as legally allowed, until reversed.—*State vs. Clarke*, 382
- And that a Judge may grant more time to issue a writ or to set up a proceeding, which has been before ordered, at any time, within a year and a day after the first order, is so, and has been so common, that the practice is not disturbed at this day, *Ib.*
- It seems that the act of the Legislature making a copy writ, of the residence of the debtor, equivalent to personal service, does not include writs of attachment.—*Richardson vs. Whitfield*, 403
- A plaintiff in *replevin*, is not to file his declaration, but his rule to plead a year and day, as other writs.—*Rodericks vs.* 407
- Defendant who has not made an appearance, nor plea, cannot move to enter up judgment of *non pros*—*Same vs. Same*, 408
35. Under our act avoiding the service of all process served on any person, at any muster, or other time where such person shall be obliged to bear arms in the militia, or in going to or returning from any muster or place of rendezvous, or within twenty-four hours after such persons being discharged from such service, includes as well *bail* writs as any other process.—*Gregg vs. Summers*, 461
36. It seems though, that a writ may be served, on such day, by leaving a copy at the most notorious place of the defendants abode, under the act of Assembly, *Ib.*
37. A sheriff must be proceeded against by process, as other persons, in order to make him a party in court.—*Smith vs. Hunt*, 476
38. It is a courtesy which one Judge owes to another not to rescind or suspend an order which the other has made. But a Judge at Chambers may rescind or suspend an order made by himself *sedente curia*.—*Ex'rs Yancey vs. Tallman*, 474
39. By the act of 1818, a Judge at Chambers has the power "to grant writs of prohibition or *mandamus* and *quo warranto*, and to hear and determine motions to stay or set aside executions, in the same manner, in every respect, as if the court was actually sitting." *Ib.*
40. Whether any and what kind of notice will dispense with the necessity of recording a deed, are questions for the court, but whether the party had or had not such notice is a question for the jury.—*Tart vs. Crawford*, 475
41. Where the plaintiff sued as assignee of one *Alexander*, the Court refused to amend his declaration, and suffer him to state *Alexander* as the plaintiff, and to strike out his own name.—*Johnson vs. Mayrant*, 484

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42. A discount to an action on a note, *within the summary process jurisdiction*, which involves the titles to land, is inadmissible.—*Lindsay vs. Lindsay*, 490
43. It *seems* that where the defendant has a *bona fide* defence involving a title to land, that on application to the circuit court, an order requiring the plaintiff to declare, may be obtained, by which means he may avail himself of such defence, *Id*
44. This court has always refused to act upon any agreement between council, about which they differ and which is not in writing.—*Dunklin vs. Whitlaw*, 492
45. The right of polling the jury is not attached to either the plaintiff or defendant, (in state as well as civil cases).—It is a mean to which the court sometimes resort, to ascertain if the jury are agreed on their verdict; but when the court is fully satisfied with the verdict, by other more accustomed means, it will not resort to it.—*State vs. Allen*, 525
46. The act of 1809, which refers the "sum actually due," on any liquidated demand to be assessed by the clerk, does not include cases wherein the judgments were final, and required no verdicts even before the act; as for instance, debt on bond or judgment.—*Dinkins et. ul. vs. Vaughan et. al*, 554
47. A judge who has presided at the trial of a case, on the circuit, cannot set aside a verdict of a jury, rendered after a full hearing, without any allegation of surprise or mistake, or any objection made to the time or manner of the trial; but simply because the verdict is alleged to be intrinsically against law or evidence: It must be by appeal to the constitutional court.—*Ex'r Thomas vs. Brown*, 557
48. It *seems* cases have occurred wherein verdicts taken by surprise or inadvertency have been set aside by the presiding judge; but none, where the objections were to the merits of the verdict, and not the manner or time of trial.—*Ex'r Thomas vs. Brown*, 557
49. Where the defendant was served with a writ, by a copy being left at his house, as is required by the act, and on a motion to set it aside, upon affidavit that "he was without the limits of the state, at the time, to wit, in Georgia," without saying that he was surprised or was in danger of suffering injury by his not knowing of such service, the court refused to set it aside, as the party may reside on the borders of the state, and may have only gone into his fields, or any small distance out of the state, in order to avoid the service of legal process.—*Lark vs. Chappell*, 566
50. To an action upon the sheriff's bond, *non est factum* and performance were pleaded.—Issue on the first, and replication that the defendant had collected a certain sum and had not paid it over, pursuant to the order of court; to which the defendant demurred generally. The court overruled the demurrer; the jury found for the plaintiff, on the issue of fact; the Court ordered the condition of the bond to be submitted to the jury, to assess the damages.—*State vs. Wiggins*, 568
- ### PRESCRIPTION.
1. No office exists in this state by prescription.—*State vs. Jeter*, 233
- ### PRISON-BOUNDS ACT.
- See Insolvent debtor.*
- ### PROCESS.
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- ### PROMISE.
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1. Where no action will lie a-

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against the person undertaken for, it is an original undertaking, and not within the Statute of Frauds.—*Mease vs. Wagner*, 395

QUO WARRANTO.

See *Information*.

RECORD.

See *Notice*.

RECOVERY, FORMER.

See *Trepass*, 5.

REPAIRS.

Upon an agreement to rent house and lot, out of the rent which was "to be deducted y repairs that may be done to same," the Court Held that erection of a shed to the ple, a fowl-house, and — use were not repairs.—*Dar- vs. Farr ow*, 517

REPLEVIN,

terest is recoverable upon plevin bond; and in debt a replevin bond, against security, interest is allowed the date of the judgment ist the principal.—*Stevens immons*, 28

an action upon a replevin the same proof is not red as in the action of re- ; to-wit, that the de- it was the tenant of the iff, at a particular rent, or the judgment in re- is conclusive in this.— *louncil vs. Price*, 299

assignee of a replevin ay bring an action up- his own name, Ib ms that all the English s down to 11 George 2, 9, inclusive, in relation vin and distress, though le of force by any sta- rovisions, have been in practice in this Ib

the goods distrained evied had not been re- praised according to f the legislature, is an which ought to have

been made in the action of re- plevin, and cannot be taken in an action on the replevin bond. The former judgment' con- cludes the party, Ib

6. A plaintiff in *replevin*, is bound to file his declaration, and post his rule to plead with- in a year and day, as other plaintiffs.—*Rodericks vs. Payne*, 407

RETAILING.

1. A feme covert, living alone from her husband and not under his power, is liable to an indictment for retailing spiri- tuous liquors without a license. *State vs. Miles*, 355

2. On an indictment for retail- ing without a license, the de- fendant must prove he had one.—*State vs. Gettins*, 573

RIOT.

1. Where on an indictment for a riot, against the defendant and two others named, with "divers other persons, to wit, to the number of five," with- out alleging that the five o- thers were unknown, or set- ting out their names, and the grand jury found a true bill, only against the defendant and one other, to which the de- fendant pleaded guilty, the court arrested the judgment. *State vs. O' Donald*, 532

RIVERS.

1. There is no legislative act in this state declaring which, or whether any, of our rivers are to be considered as public or navigable.—*Exr. of Cates vs. Wadlington*, 580

2. The rule of the English com- mon law, that no river is navi- gable except where the tide ebbs and flows, is not applica- ble to this country, Ib

3. But that cannot be consider- ed a navigable river, the natu- ral obstructions of which pre- vent the passage of boats of a- ny description whatever, Ib

4. A river that is merely *capa- ble* of being made navigable is considered, as respects the

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owners of the adjacent lands, as a mere imaginary line, the claim of each extending to the center of the bed, (*usque ad flum aque.*) But an individual has not such an exclusive right to a river which is capable of being made navigable, that the legislature may not declare it to be a public highway, whenever the obstructions are removed, and it becomes fit for public use,

4. The public may use the waters for the purpose of navigation; but that does not impair the right of the individual to the soil and use of the water, as far as is consistent with the right of the public,
5. A purchaser must be supposed to know as well as the seller what right and title an individual can have to a navigable river,

ROAD.

1. Where two tracts of land call for a road, as the dividing line, the owners on each side hold to the middle of the road.—*Witter vs. Harvey*, 67
2. Where a person lays out a road through his own land, and for his own convenience, it is not a dedication of it to public use, unless it lead to a market, or other public place, 16

SCIRE FACIAS.

1. Interest cannot be recovered on a *scire facias*.—*Ex'rs Mann vs. Ex'rs Taylor*, 171

SEAMAN.

1. It seems, that a master of a ship, by the ancient marine law, when a seaman is sick or disabled, is bound to provide every thing necessary for his recovery, and has a right to deduct the amount out of his wages.—*McBride vs. Watts*, 384

SECRETARY OF STATE.

1. The act of 1803, to authorize office copies of grants to be given in evidence, includes as well office copies, certified by

the deputies of the secretary of state and of the surveyor general, as by those officers themselves.—*Maxwell ads. Carlie*, 534

SECURITY.

1. Where an officer, who is elected annually, gives a bond for the faithful discharge of the duties of his office, his securities are bound only for one year, although there is no time specified in the bond, and although he should be re-elected several years in succession.
—*So. Ca. So. vs. Johnson*, 41

SET OFF.

See Discount. 1.

SHERIFF & SHERIFF'S SALES.

See Information.

1. Before the securities of the sheriff can be sued on their bond, a *nulla bona* must have been returned on some *fi. fa.* against the sheriff.—*Trearrers vs. Newby*, 184
2. If the sheriff have been sued first and *nulla bona* returned, then no imparlance will be allowed his securities in the particular case in which such return may have been made, 16
3. By the act of 1796, regulating sheriff sales, and generally called, the *ten per cent. law*, if the plaintiff desire and direct the sheriff by a notice in writing, in time to enable him to insert it in one of his advertisements, the purchaser of property, immediately after it is knocked off, may be required to pay *ten per cent.* on the purchase. And if he fail or neglect to make such payment, the sheriff is bound to set the same property up for sale upon the spot; and upon the resale, the sheriff is forbidden to receive the bid of the former purchaser.—*Scott vs. Wilson*, 194
4. When the plaintiff demands and receives the *ten per cent.* the sheriff cannot immediately resell, but when he does not, the property may be resold

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- even on the same day, *ad infinitum*, if the terms be not complied with, 16
5. Whether the ten per cent. is to be received or not, is entirely at the desire and direction of the plaintiff: When it is not required, the law stands as before the act, 16
6. By the constitution, the sheriffs hold their offices for the term of four years; and where the governor under the act of 1808, appointed a sheriff to fill a vacancy until an election should take place, such sheriff, being in office, is in under the constitution, and holds his office for four years. — *State vs. McClintock*, 245
- The return of the sheriff is good, although it does not appear to have been sworn to; equally so where it has been sworn to by the deputy sheriff, but not signed by the sheriff. *City Council vs. Price*, 299
- The defendant, paying money over to the sheriff, on an execution, cannot be considered as paying it voluntarily; and if improperly paid, the sheriff, upon a rule may be ordered to pay it back. — *Levy Roberts*, 395
- Where a sheriff was ruled a plaintiff for not collecting the money under a *fi. fa.* shew for cause, that he levied upon a horse, the property he could find, and the horse had been taken of his hands by a writ of *replevin* of a third person, claimed the horse, the court *Held*, that the sheriff was bound to obey the writ, that the cause shewn was insufficient. — *Taylor vs. How*, 418
- Upon a rule against the sheriff shew cause why certain money collected for fines in the court of sessions should not be paid over, the court *Held* that the sheriff was entitled to retain 5 per cent. for his commissions the amount collected; and that the clause of the county court act under which he made such claim was repealed by the Judiciary act of 1798, and that the act of 1791, regulating the fee bill, repealed all former acts allowing costs, and allowed none in this case. — *State vs. Sheriff of Charleston*, 419
11. An express warranty of title does not exclude an implied warranty of soundness. — *Wells vs. Spears*, 421
12. A sheriff must be proceeded against by process, as other persons, in order to make him a party in court. — *Smith vs. Hunt*, 464
- ### SHIP.
- See Necessaries.*
- ### SLANDER.
- See Insolvent debtor's law.* 1.
1. In an action of slander, for words spoken by the husband, words spoken by the wife can not be joined; and it is a subject for arrest of judgment if the wife be joined for words spoken by the husband alone. *Penters vs. England, et ux.* 14
2. In an action of slander, where the witnesses were doubtful whether the words spoken were, "you are a damned mulatto son of a bitch," or "you are a damned mulatto looking son of a bitch," and the words laid were, "you are a damned mulatto son of a bitch," the court *Held*, that the words proved did not support the plaintiff's declaration; although at the time of uttering the words, the defendant, after the witnesses were called upon by the plaintiff to take notice of what he said, repeated, "I never eat my words; if you are not a mulatto, your looks belie you." — *Atkinson vs. Hartley*, 203
3. Bail is allowed in slander. — *Pearson vs. Pickett*, 472
4. In an affidavit to hold to bail in slander, the words spoken must be alleged to be false, 16

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3. Where the defendant said of the plaintiff, "you did steal my brothers cotton and I can prove it," the Court *Held* it actionable; nor does it seem it would have made any difference, if the defendant had alluded to cotton, which the plaintiff had to gin for defendants brother.—*Stokes vs. Struckey*, 562

SOLICITOR.
See Constitution.

STATUTE.
See Frauds.

1. Where a new remedy or a new cause of action is given by statute, the plaintiff who would avail himself of either, must bring himself within the statute.—*London vs. Moses & Co.* 120

2. Where a remedy under a statute is given, it must be strictly pursued, and it must appear on the face of the proceedings, that the plaintiff's case is such as to authorize him to recover under the act. *Love vs. Lowry*, 181

3. It seems that all the English Statutes down to 11 George chap. 19, inclusive, in relation to replevin and distress, though not made of force by any statutory provisions, have been adopted in practice in this state. *City Council vs. Price*, 299

SUBORNATION OF PERJURY.
See Perjury. Evidence, 5.

SUMMARY PROCESS.

1. The summary process jurisdiction of this Court is not concurrent with the jurisdiction of the Court of Equity. It only furnishes a different method of trying cases within the jurisdiction of the Court before such proceedings were established.—*Taylor vs. Drake*, 174

2. Where a decree in a Summary Process had been given against a defendant on the first day of court, upon his making the following affidavit, on the

second day, the court ordered the decree to be opened, that defendant might make his defence, viz: "that on Monday morning, (which was the day on which the court sat,) a negro child, the property of the defendant had been found dead, which was supposed to have been murdered, and that that circumstance alone prevented his entering his appearance within the regular time, and that he had been informed by his counsel that he had a substantial defence."—*Evans vs. Parr*, 283

3. Where the plaintiff's demand has been reduced by actual payments, to a sum within the Summary Process jurisdiction, he must proceed by way of Summary Process for the balance; and if he bring his action for the whole, he can recover only the costs of a Summary Process. But it is otherwise where there are mutual demands, and the plaintiff's debt is reduced by discount; because he may not know the amount of the defendant's demand; neither can he know that he will avail himself of such defence.—*Levy vs. Roberts*, 395

SURVEYING.

1. The general rules of surveying are; (1) that natural boundaries should govern, (2) artificial marks, (3) course and distance. Generally speaking, the first ought to control, because the most permanent and certain; but a correct location consists in the application of any one, or all of these rules to the particular case; and when they lead to contrary results, that must be adopted which is most consistent with the intention apparent on the face of the grant.—*Colclough vs. Richardson*, 167

2. And course and distance, though the feeblest and most liable to err, will control natural marks or boundaries,

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where it is apparent on the face of the grant that they were inserted by mistake, or laid down without regard to rule, or where they do not in fact exist, or are found at such a distance from the other marks of location, as to render it unreasonable to presume them. And there is a distinction, it seems, when a water-course is called for as a boundary, and when it is represented as running through the tract, 16

In ascertaining the metes and bounds of lands, natural objects or artificial marks should generally govern; where they cannot be ascertained, course and distance must prevail; where neither can be ascertained, the plaintiff can only recover the number of acres purchased; and all may be resorted to in aid of each other. *Welch & Phillips*, 215

The lines of a tract of land must always be extended to the bounds called for, where evidence of a higher name intervenes to control them.—*Nelson vs. Frierson*, 232
Where two tracts of land, and one projects over or under the other, and that action is called for, or rejected in the plat of a tract which calls for both boundary, such projection shall be considered as a line, and the line shall be extended to it, although it extends the distance called for.—*vs. Holliday*, 255

vs. paribus lines should be closed in the manner most favorable to the old grant, 16

tract calling for another boundary, precludes the running into it.—*Bond v. Littlebaum*, 584

TENANTS.

Landlord and Tenant.

TENANTS IN COMMON.
Tenant in common may

maintain an action to try titles, and can recover whatever proportion of land he may show himself entitled to.—*Watson vs. Hill*, 161

TITLE.

See Limitations. Trespass to try Titles.

1. A. conveyed a tract of land to B.—B. some time after delivered up the title to A. to be destroyed, and it was destroyed; this does not revert the right in A.—*Turnipseed vs. Busby*, 279
2. Where the actual possession of one claiming title under the statute was without the bounds of the plaintiff's grant, he could acquire no title by constructive possession to any part of the plaintiff's tract over which his prior grant run, 16
3. A title cannot be acquired under the statute of limitations, where the party to be affected by the possession had no right to sue, 16
4. An interrupted possession will not give title, 16
5. In an action of trover, where the defendant received a negro slave of the plaintiff, upon a promise to return him, on a certain event, which had occurred, the court *Held*, that it was not necessary to inquire into the strict legal title of the plaintiff.—*M'Neil vs. Philip*, 392

TRESPASS.

1. *Trespass vi et armis* is the proper action for beating plaintiff's slave.—*Goddard vs. Wagner*, 100
2. A trespass must be proved as laid.—*Sanders vs. Palmer*, 165
3. Where the declaration stated, that a trespass had been committed on a certain day, upon a horse and cow, proof that the trespass was committed on the horse in 1817, and on the cow in 1820, will not support the declaration, 16
4. If the trespass be of a permanent nature, in which the

INDEX,

injury is continually renewed, the declaration should state it with a *continuando*, *Ib* 166

5. A recovery in an action of trespass on lands, is a bar to an action to recover mesne profits, for use and occupation of the same land, anterior to the verdict in trespass.—*Coleman vs. Parish*, 264

TRESPASS TO TRY TITLE.

See Title. Limitations.

1. Where two tracts of land call for a road, as the dividing line, the owners on each side hold to the middle of the road.—*Witter vs. Harvey*, 67
2. Where a person lays out a road through his own land, and for his own convenience, it is not a dedication of it to public use, unless it lead to a market, or other public place, *Ib*
3. One tenant in common may maintain an action to try titles, and can recover whatever proportion of land he may show himself entitled to.—*Watson vs. Hill*, 161
4. The general rules of surveying are, (1) that natural boundaries should govern, (2) artificial marks, (3) course and distance. Generally speaking, the first ought to control, because the most permanent and certain; but a correct location consists in the application of any one, or all of these rules to the particular case; and when they lead to contrary results, that must be adopted which is most consistent with the intention apparent on the face of the grant.—*Colclough vs. Richardson*, 167
5. And course and distance, though the feeblest and most liable to err, will control natural marks or boundaries, where it is apparent on the face of the grant that they were inserted by mistake, or laid down without regard to rule, or where they do not in fact exist, or are found at such a distance from the other marks of location, as to ren-

der it unreasonable to presume them. And there is a distinction, it seems, when a water-course is called for as a boundary, when it is represented as running through the tract, *B*

6. The lines of a tract of land must always be extended to the bounds called for, where no evidence of a higher nature intervenes to control them.—*Nelson vs. Frierson*, 252
7. Where two tracts of land join, and one projects over or beyond the other, and that projection is called for, or represented in the plat of a third tract which calls for both as a boundary, such projection shall be considered as a station, and the line shall be extended to it, although it exceed the distance called for.—*Stokes vs. Holliday*, 259
8. *Ceteris paribus* lines should always be closed in the manner most favorable to the oldest grant, *Ib*
9. The rule of law that parol evidence shall not be admitted to explain or contradict a deed applies as well to cases involving the titles of land as to others.—*Milling vs. Crankfield*, 258
10. The plaintiff in trespass to try titles cannot maintain his action unless he prove an actual trespass.—*Cornneil vs. Bickley*, 466

TROVER.

1. It is not necessary in order to maintain an action of trover, that a demand and refusal should be proved where the taking has been tortious.—*Ex're Webb vs. Duncan*, 213
2. In an action of trover, where the defendant received a negro slave of the plaintiff, upon a promise to return him, on a certain event, which had occurred, the court *Held*, that it was not necessary to inquire into the strict legal title of the plaintiff.—*McNeil vs. Philip*, 392
3. The law adjudges the possession to be in the person

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who has the right; and such constructive possession is sufficient to enable the owner to maintain an action of trover.

—*Jones vs. Dugan*,

429

4. Where there is an unlawful conversion, no demand is necessary; and any withholding of the property against the will of the owner is evidence of conversion,

Id

5. A defendant, after verdict, cannot make an objection to the authority of a person who made the demand, in a case of trover, when no objection had been made at the time of the demand, and when the refusal was not on the ground that the party did not produce such authority,

Id

The Statute of Limitations cannot be given in evidence under the general issue in an action of trover, but must be specially pleaded,

Id

When the right of property is in the plaintiff's ward, and the defendant holds over after action commenced, very slight evidence of a conversion is sufficient; therefore, where the plaintiff's ward, who lived with his uncle the plaintiff, is the owner of a horse, which horse was demanded of the defendant by the plaintiff, before he was legally appointed guardian for his ward, he gave the name of his ward, and the defendant replied that the horse did not belong to his nephew, and refused to deliver it up, the court *Held* that the uncle should be regarded as the agent of his nephew, and a demand by him as equivalent to a demand by his nephew.—*Fowler vs. Stuart*,

504

USURY.

See Interest.

Bond bearing interest from its date anterior to its date, is usurious.—*Levy vs. Hamp-*

145

Where a person gave a note for \$500, for valuable consideration, payable sixty days af-

ter date, and when it became due, in order to obtain the further time of sixty days, gave his due bill for fifty dollars, and took a renewed note for \$500, payable sixty days after date, the court *Held* the transaction usurious, and that the note of \$500, as well as that for \$50, was void under the Statute; for, it seems, every renewal of a note is a new contract.—*Motte vs. Dorrell*,

350

3. The borrower of money lent upon usury, may in a civil suit be a competent witness to prove the usury against the lender, who sues upon the usurious contract, where the lender will not deny the usury on oath, or is dead and unable so to deny it.—*Exr. Thomas vs. Brown*,

557

VENDUE AND VENDUE MASTERS.

1. When a person is sued for money received for goods sold by him as vendue-master, he is not entitled to an imparlance.—*Missroon vs. Freun*,

38

2. But whether he acted in the capacity of vendue-master or not, is a question of fact, to be tried by the jury, and not by the Court,

Id

3. Where a party brings an action against a vendue master to recover money for goods which he had sold, and sets forth in his declaration that the defendant was indebted as vendue master, to entitle the case to a preference on the docket, a demurrer, assigning for cause, that the declaration did not state whether the plaintiff proceeded at common law or under the statute, will be overruled.—*Lowden vs. Moses & Co.*

120

4. The proper time for contesting the right of the defendant, a vendue master, to the benefit of the insolvent debtor's act, is on his application for the same,

Id

5. If the defendant think proper to dispute the right of the

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plaintiff to a preference on the docket, in suits against vendue masters, he can always do so by his pleading,

Id

WHARFINGER.

1. A wharfinger, who has not been directed to store, is not liable for the loss of rice upon his wharf, after it has been weighed; for the wharfage paid is not a consideration for the safe keeping of the rice.—*Peuzant vs. Crawford*,

334

WARRANTY.

See Damages.

1. The law of implied warranties applies as well to property exchanged, as to property purchased.—*Rivers vs. Griggs*,

100

2. Where a tract of land had been sold by the Master in Equity, and represented upon a map as containing more acres than it was discovered upon a resurvey to have, an abatement will be allowed for the deficiency in the quantity, according to the nature and extent of the defect.—*Tunno vs. Fludd*,

121

3. The rule of *caveat emptor* does not apply to sales by the master in chancery, for he being the agent of the parties, for whose benefit the sale was made, they are as much bound by his representations as they would have been by their own,

Id 122

4. A conveyance of "a tract of land containing a mill seat, with a dam and timber ready for building, which mill seat, dam, pond, timber, and all other appurtenances to the said premises, and I do warrant, &c." it was *Held*, that a third person having a title to the land which one half of the water in the mill pond covered, but not to any part of the land mentioned in the deed of conveyance, was a breach of the warranty; as the mill was of no use without the whole pond being full of water.—*Lide vs. Thomas*,

125 note

5. An implied warranty does not extend to the moral qualities of a slave.—*Smith vs. McCull*,

220

6. On a breach of warranty expressed or implied, in the sale of an article, the damages to be recovered must be rateable with the loss; and if a total loss, the whole sum paid, with interest, may be recovered back.—*Egleston vs. McCauley*,

379

7. In cases of eviction the price of the land and interest from the time of the purchase shall be the measure of damages; but where the loss is only partial, the party evicted may shew that the part of the land lost is more valuable than the rest, and claim a compensation adequate to the loss; i. e. the relative value and not the average price is the measure of damages.—*Admr. of Wallace vs. Tulbot*,

466

8. To an action upon a note, to which *non assumpsit* was pleaded, the defendant may prove that it was given for a tract of land, the lines and boundaries of which were fraudulently misrepresented by the vendor.—*Ear. of Garry vs. Shelton*,

470

9. Where the defendant purchased a tract of land of the plaintiff, to whom the plaintiff gave a conveyance in the form prescribed by the act of 1793, (with a warranty against all lawfully claiming, &c.) and afterwards, when he called upon the defendant for his note for the purchase money, promised the defendant that his wife should renounce her dower, which was an objection made by the defendant to his giving his note, the Court *Held*, that this promise, made after the conveyance, was without consideration, and against the policy of the law.—*Massey vs. Craine*,

489

10. And in an action upon such note, where a discount was set up, that the wife's dower had not been released, the Court *Held*, that the defendant could

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be allowed nothing for the dower; for as the husband is now living, it is only possible that the right of dower may accrue, and a possible injury is not a subject for damages. *16*

11. A purchaser of land may maintain an action of covenant on the warranty, (against all persons lawfully claiming or to claim,) before eviction, by showing a paramount title in a third person; but where the plaintiff claimed a tract of land and thinking that the defendant's title was better than his, and, to obtain this outstanding title, purchased this tract, with two others adjoining, and took a deed in the form prescribed by the act of 1795, (containing a warranty as above,) and afterwards discovered that his first title was better than the second, and commenced his action against the defendant, for a breach of the warranty, not being disturbed by the claim of any third person, the Court nonsuited the plaintiff; because it could not be intended that the vendor would give a warranty against the title of the vendee himself, when it was bought for the purpose of protecting that title.—*Biggs vs. Brady*, 500

12. An express warranty of title under seal does not exclude an implied warranty of soundness.—*Wells vs. Sparks*, 421
S. P. Banks vs. Hughes, 537

13. A purchaser must be supposed to know as well as the seller what right and title an individual can have to a navigable river.—*Ex'r Cates vs. Wadlington*, 580

14. Every person accepts a grant upon the faith of the public, and not of the grantee. The grantee is not supposed *prima facie* to know any thing more of it than what appears upon its face; and of that, the purchaser from him, is supposed equally competent

to judge.—*Bond vs. Quattlebaum*, 584

14. It may be laid down as a general rule, that when a person sells land by the metes and bounds of an original grant, if the purchaser gets all the land embraced by the grant, even though the lines shall be closed in a different manner than was contemplated by the parties, or should even contain less than it purports to contain, the purchasers can have no recourse to the seller, except upon some special covenant or intentional misrepresentation. *16*

WILLS AND TESTAMENTS.

See Legacy.

1. Where the witnesses to a will are dead, their hand writings may be proved to establish the will.—*Sampson vs. White*, 74

2. The will of a feme covert giving her property to her husband, is void, though made with his consent.—*Hood vs. Archer*, 225

3. The subscribing witness swearing that he saw the testator sign, &c. "and that he attested the will in his presence, and in presence of the testator," is sufficient evidence that the testator executed the will in the presence of all the witnesses.—*Turnipseed vs. Hawkins*, 272

4. There is no precise form of words necessary for a will of personal property, but whatever form be adopted, it must always be made to appear that the intention of the testator was fixed and determined.—*Brown vs. Shand*, 409

5. It is not necessary to a will of personal property that it should have two witnesses: nor any, indeed, so the hand writing of the testator can be proved.—*White vs. Helmes*, 430

6. It is not necessary to constitute a paper a will, that the *animus testandi* should appear on the face of the paper. *16*

7. A feme covert, cannot by

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her last will and testament, made with her husbands consent, bequeath her choses in action to him.—*Hood vs. Archer*, 477

8. There is no prescribed form of words for a will; but if it be the intention of the testator to make a disposition of his estate, to take effect after his death, then it is his will, whatever may be the form. And there are several methods of coming at this intention; (1) where it is so expressed on the face of the writing itself; (2) where the paper is in the form of a deed, letter or memorandum, or in any other form, containing an actual disposition of his estate to take effect after his death, and though not a will in form, is so in its effects and operation; (3) when the intention is doubtful and cannot be collected from the face of the paper, but by parol proof.—*McGee vs. McCants*, 517

9. A letter containing these words, was held not to be a will; viz: "I am desirous to see you, and would be glad you could come down immediately, as it is my wish you should *have* every thing I *have* at my decease; but I fear unless you come quickly, I will be defrauded out of every thing by a person I once took to be a friend. I know you can save the property for me, and all I desire is the use of it my life time, and it is more than probable that will not be long." "I would write more fully on the subject, but can explain every circumstance to you better when I see you." It was proved that the deceased did not suppose it would be his will,

10. Evidence that the deceased, on his death bed said "he gave all his personal property to his sister Jane;" and being asked if he wished any of his relations to have any of his property, replied, "no, that it

was his sister Jane's, and she might do as she pleased with it," was held not sufficient evidence to establish a nuncupative will, B

11. "I will and bequeath to my son Robert, one of the plantations I now live on, adjoining Wren and Roper," was held by the court to convey only a life estate.—*Witherspoon vs. Dunlap*, 546

12. Where there are no words of inheritance, or words equivalent thereto, the estate (of real property,) is for life, B

WITNESS.

See Evidence.

1. It seems to be very well settled, that an objection to the competency of a witness can be sustained only,

1st. Where he has a direct interest in the event of the cause.

2d. Where the judgment can be given in evidence for or against him in another cause.

3d. Where it has been settled by solemn decisions that from motives of policy or expediency, he ought not to be permitted to give evidence.—*State vs. Anthony*, 285

2. The same interest which will exclude the husband will exclude the wife; but it is laying down the proposition too broad to say that the wife can in no case be a witness where the husband is incompetent, B

3. A conviction of perjury or felony will render a husband incompetent, but not the wife, B

4. The prisoner was indicted, together with his son, for murder. The father was charged with having given the mortal wound, and the son as having been present, aiding and assisting. They were tried separately; and on the trial, first, of the father, the court held, that the wife of the son was a competent witness; for both being charged as principals, one may be tried and convicted, and the other acquitted, B

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4. A free negro is an incompetent witness in any case when the rights of white persons are concerned.—*White vs. Helms*, 430
5. It is not necessary to a will of personal property that it should have two witnesses; nor any, indeed, so the hand writing of the testator can be proved, *Id*
6. Where two gave their joint and several note, upon which one was sued, the other cannot be a witness for the defendant.—*Kile vs. Graham*, 552
7. The borrower of money lent upon usury, may in a civil suit be a competent witness to prove the usury against the lender, who sues upon the

usurious contract, where the lender will not deny the usury on oath, or is dead and unable to deny it.—*Ex'r Thomas vs. Brown*, 557.

WORDS.

See Slander.

WORK AND LABOUR.

1. In the absence of any contract, the legal presumption is, that the workman is bound to furnish his own tools and machinery.—*Hort vs. Norton*, 22
2. If a workman be employed to do a particular job, and he chooses to do some additional work, without consulting his employer, he cannot recover for such work, *Id*

Ex. G. A. A.

ERRATA.

Page.	Line.
2	13 for <i>maked</i> read <i>marked</i> .
31	10 insert <i>which</i> before <i>may</i> .
70	11 for <i>mean</i> read <i>near</i> .
143	14 strike out Judge Nott's name.
153	13 for <i>declaration</i> read <i>deduction</i> .
256	— in the upper platt read <i>plaintiff's</i> for <i>defendant's</i> land.
261	3d line from bottom, for <i>carriers lines</i> , read, <i>corners, lines</i> .
263	6 from bottom, for <i>terminers</i> read <i>terminus</i> .
449	14 for <i>account</i> read <i>count</i> .

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